86-669

NUMBER 86-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MISSOURI PACIFIC RAILROAD COMPANY, ET AL.,
Petitioners

v.

W. G. TAYLOR, ET AL.,
Respondents

PETITION OF MISSOURI PACIFIC RAILROAD COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1) Is it improper for the federal courts to extend their jurisdiction to adjudicate union representation issues when the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, vests exclusive jurisdiction to an administrative tribunal for prompt resolution of labor disputes?

2) Does the Railway Labor Act preclude a provision in a collective bargaining agreement that stipulates union representation in grievance handling at the company level shall be limited to the craft designated by the terms of the collective bargaining agreement?

DESIGNATED LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT BELOW

1) W. G. Taylor
2) K. P. Brockhoeft
3) A. J. Ruiz
4) Wayne A. Sepcich
5) Brotherhood of Locomotive Engineers
6) United Transportation Union
7) Missouri Pacific Railroad Company

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OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 794 F.2d 1082 (5th Cir. 1986). The opinion of the District Court (Appendix B) is reported at 614 F. Supp. 1320 (E.D. La. 1985).

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on July 23, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND FEDERAL REGULATIONS INVOLVED

The Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (1972), and 29 C.F.R. Part 1206 (1983) are the focal point in this case. The pertinent provisions of the Railway Labor Act and the attendant regulations are set forth in Appendix C, *infra.*

CONCISE STATEMENT OF THE CASE

Respondents requested the district court to by-pass the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.*, and invalidate a common provision in collective bargaining agreements that designate the signatory union as the exclusive representative at company-level grievance hearings. Failing to defer to the National Mediation Board established under the RLA, the district court interjected itself into this labor dispute and held that the contractual undertaking between the United Transportation Union and the Missouri Pacific Railroad Company was invalid. The Court of Appeals, noting the novelty of the legal issues, affirmed. The decisions below are contrary to the Railway Labor Act, and are in conflict with both the rulings by this Court and lower courts.

STATEMENT OF THE CASE

The Brotherhood of Locomotive Engineers and four individuals working as switchmen for the Missouri Pacific filed this lawsuit and alleged that certain provisions of two separate collective bargaining agreements between Missouri Pacific and the United Transportation Union violated the Railway Labor Act ("RLA" or "Act"), 45 U.S.C. §§ 151-164. The BLE plaintiffs sought declara-

tory and injunctive relief seeking to prohibit the Missouri Pacific's adherence to this contractual undertaking, and, the BLE also sought damages on the basis that the challenged grievance procedures prevented the BLE from increasing its membership.

Missouri Pacific filed a motion to dismiss based upon lack of subject matter jurisdiction, which motion was denied by the district court. The BLE and the UTU respectively filed cross motions for summary judgment. Missouri Pacific demonstrated the Court's lack of subject matter jurisdiction and requested the district court to defer to the statutorily-created administrative procedures. MOPAC also presented genuine issues of fact that prevented rendition of summary judgment under FRCP Rule 56.

The district court ruled that it should decide this labor dispute. The district court concluded that the exclusive representation provisions, which provided that only the UTU could represent its members at a company level grievance hearing (which was the same contractual arrangement Missouri Pacific had with the BLE), were not valid with respect to Missouri Pacific's New Orleans facility.

An appeal was taken to the Fifth Circuit Court of Appeals. While recognizing that the issues in this case are serious and substantial, the Fifth Circuit affirmed the district court's opinion. From these erroneous rulings, Missouri Pacific seeks review by this Court.

STATEMENT OF FACTS

Plaintiffs-respondents, W. G. Taylor, K. P. Brockhoeft, A. J. Ruiz, Wayne A. Sepcich, and The Brotherhood of

Locomotive Engineers ("BLE"), instituted this action against the Missouri Pacific Railroad Company ("MOPAC") and the United Transportation Union ("UTU"). Their Complaint seeks to vitiate certain provisions of the MOPAC/UTU collective bargaining agreement because those provisions allegedly violate the Railway Labor Act ("RLA" or "Act"), 45 U.S.C. §§ 151-164. In particular, the complainants challenge the collective bargaining clause that designates the UTU as the proper representative of its members at company level grievance hearings. The BLE plaintiffs sought declaratory and injunctive relief to prohibit MOPAC's adherence to this contractual undertaking with the UTU as part of their collective bargaining agreement. The complainants also sought money damages but they subsequently withdrew this claim.

Plaintiff/respondents are four New Orleans employees of Missouri Pacific Railroad Company (MOPAC), who worked as switchmen for MOPAC. The United Transportation Union ("UTU") is the collective bargaining representative for the crafts of switchmen and firemen employed by MOPAC. BLE is the collective bargaining representative for the craft of locomotive engineers employed by MOPAC under the Railway Labor Act. MOPAC is a party signatory under separate collective bargaining agreements with BLE and UTU for each craft. Although the individual plaintiffs served as switchmen for the Missouri Pacific, they also are members of the BLE, the engineers' collective representative. At all times relevant to this action, including the time they were disciplined by MOPAC, the individual complainants worked for MOPAC as switchmen.

In 1983 and 1984 the individual MOPAC employees were subject to MOPAC disciplinary proceedings and filed grievances with MOPAC. These grievances and disciplinary proceedings concerned the employees' duties as switchmen while they were working as switchmen.[1] The collective bargaining agreement between MOPAC and UTU provides detailed grievance machinery for switchmen to contest disciplinary action at the company level. Article 18 of the collective bargaining agreement specifies that the UTU is the "duly accredited representative", and, as the exclusive union representative for switchmen, the collective bargaining agreement stipulates that UTU shall protect switchmen interests at company level disciplinary proceedings. (A copy of Article 18 is attached as Appendix D).[2]

The individual employees, despite their constant status as switchmen, additionally are members of the BLE. They claim the right to be represented by the BLE, rather than by the UTU, and further contend that MOPAC's adherence to the collective bargaining agreement violated Sections 2 and 3 of the RLA—despite the undisputed fact that MOPAC was simply acting pursuant to the explicit terms of the bargained agreement negotiated between UTU and MOPAC. The UTU-MOPAC collective bargaining agreement has been in effect for many years and is now being challenged by complainants as the result of the BLE's recent jurisdictional battle

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1. Though Taylor briefly worked as an engineer years prior to this dispute, none of the other individuals involved in the disciplinary hearings have ever worked as engineers for MOPAC.

2. Article 28 of the BLE-MOPAC collective bargaining agreement works the same way, designating BLE as the "duly accredited representative" for company-level proceedings.

with the UTU for membership. *Cf. Landers v. Nat'l Railroad Passenger Corp. and BLE,* ____ F. Supp. ____ (D. Mass. 1986) with *Coar v. Metro-North Commuter R. Co.,* 618 F. Supp. 380 (S.D.N.Y. 1985). The litigation on the representational issue is apparently a circuitous means of seeking to increase a union's membership.

The collective bargaining agreement between MOPAC and the UTU provides for non-judicial settlement of disputes occurring between MOPAC and its switchmen (MOPAC-UTU Agreement, Paragraphs 18 and 23).[3] Any disagreements over proper interpretation of the collective bargaining agreement itself are to be settled by grievance committees composed of members of MOPAC and the involved union (MOPAC-UTU Agreement, Article 23). Respondents seek to invalidate Article 18 of the MOPAC-UTU agreement, which is an often utilized clause in the collective bargaining process. Abrogation of exclusivity provisions would disrupt federal labor policy and would violate the Railway Labor Act.

This lawsuit is bottomed upon interpretation of the language and policies of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* The RLA, a dispute-settling mechanism, provides an alternative pathway of administrative resolution of railroad labor disputes in lieu of litigation. Yet, the lower courts' rulings contravene the explicit purpose and spirit of the Railway Labor Act.

The present dispute involves the question of which union has the right to represent MOPAC switchmen

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3. A copy of Article 23 of the MOPAC-UTU agreement is appended as Appendix E.

during grievance proceedings at the company level. Reference to the RLA shows that such disputes should be governed by Section 2, Ninth (45 U.S.C. § 152), which states in pertinent part:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees and authorized in accordance with the requirement of this Act, it shall be the duty of the National Mediation Board, upon request of either party to the dispute, to investigate such dispute. . . .

Section Two, Ninth of the RLA invests exclusive and primary jurisdiction of representation disputes with the National Mediation Board. See also, 29 C.F.R. § 1206, *et seq.* In view of this express statutory directive and the supporting jurisprudence, MOPAC submits that this representational issue is squarely addressed by the RLA. See, *Switchmen's Union v. Nat'l Mediation Board,* 320 U.S. 927 (1943). Instead, the BLE erroneously and prematurely took its representational claims to the district court.

The district court thus erred when it exercised subject matter jurisdiction before the administrative remedies under the RLA were exhausted. The BLE weakly attempts to transform this representational dispute into a question of the validity of the contract itself. This "sleight of hand" argument should not be juridically embraced. Rather, the federal courts should defer to the National Mediation Board to resolve this representational battle between the UTU and the BLE. This is exactly the procedure that was contemplated by Congress. 45 U.S.C. § 152.

Union jurisdictional controversies are not within the authority of the federal courts. Section Two, Ninth (45 U.S.C. § 152), provides that exclusive jurisdiction for settlement of union representational or jurisdictional rights shall be vested with the National Mediation Board. This principle was reaffirmed by this Court in the 1943 trilogy of *Switchmen's Union v. Nat'l Mediation Bd.*, 320 U.S. 297; *Gen'l Committee v. Missouri-Kansas-Texas Railroad Co.*, 320 U.S. 323 (*M-K-T*); and *Gen'l Committee v. Southern Pacific Co.*, 320 U.S. 338. These three cases, like the present case, involved a union's objection to contractual provisions between another union and the carrier. In each case within the jurisdictional trilogy, this Court held that the disputes were not justiciable. They were, instead, classified as matters within the exclusive jurisdiction of the National Mediation Board. *Ibid.*

In *M-K-T, supra,* one union negotiated with the carrier and effected an agreement according it favorable treatment over another union. The displaced union objected and sought to have the contract declared invalid under the Railway Labor Act. In overturning the lower court's rulings on jurisdictional grounds, this Court explained:

> It is true that the present controversy grows out of an application of the principles of collective bargaining and majority rule. It involves a jurisdictional dispute—an asserted overlapping of the interests of two crafts. It necessitates a determination of the point where the authority of one craft ends and the other begins or of the zones where they have joint authority. . . . 320 U.S. at 334.
>
> *It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not*

> *to leave their solution to the courts.* As we have already pointed out, Congress left the present problems far back in the penumbra of those few principles which it codified. Moreover, it selected different machinery for their solution. Congress did not leave the problem of inter-union disputes untouched. It is clear from the legislative history of Section 2, Ninth that it was designed not only to help free unions from the influence . . . of the carriers, but also to resolve a wide range of jurisdictional disputes between unions or between groups of employees. However wide may be the range of jurisdictional disputes embraced within Section 2, Ninth, Congress did not select the courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board. The present dispute falls within Section 2, Ninth, the administrative remedy is exclusive. 320 U.S. at 336 (emphasis supplied).

In *Gen'l Committee v. Southern Pacific Co.*, 320 U.S. 338 (1943), one union again sought to have another union's agreement with the carrier declared invalid. That agreement affected substantive rights and representational rights in grievance procedures. This Court again refused to reach the merits of the controversy; this Court, finding that the case turned upon an issue similar to the issue in *M-K-T*, stated:

> It involves, that is to say, a jurisdictional dispute between two unions. It raises the question whether one collective bargaining agent or the other is the proper representative for the presentation of certain claims to the employer. It involves a determination of the point where the exclusive jurisdiction of one craft ends and where the authority of another craft begins. For the reasons stated in our opinions in

> the *Missouri-Kansas-Texas R. Co.* case and in the *Switchmen's* case, we believe that Congress left the so-called jurisdictional controversies between unions to agencies or tribunals other than the courts. We see no reason for differentiating this jurisdictional dispute from the others. . . . 320 U.S. at 343-344.

These decisions by the Court are not isolated in the jurisprudence. The federal judiciary repeatedly has determined that the National Mediation Board—not the federal courts—has exclusive jurisdiction concerning disputes over union jurisdiction. *See, e.g., Brotherhood of Local Firemen & Engineers v. Seaboard Coast Line R. Co.,* 413 F.2d 19 (8th Cir. 1969), *cert. denied,* 396 U.S. 963 (1969); *Brotherhood of Local Firemen & Engineers v. Louisville & N.R. Co.,* 400 F.2d 572 (6th Cir. 1968), *cert. denied,* 393 U.S. 1050 (1969); *Division 14, Order of R.R. Telegraphers v. Leighty,* 298 F.2d 17 (4th Cir. 1962), *cert. denied,* 369 U.S. 813 (1962).

The BLE has not attempted to challenge the correctness of these judicial rulings. The BLE has not even attempted to distinguish these decisions.

Noting that the issue of subject matter jurisdiction deserved "serious consideration and discussion", the Court of Appeals below found that the exclusive representation provisions of the collective bargaining agreements were properly considered by the trial court. The Court of Appeals also held that the collective bargaining provisions could be ignored as unenforceable. The intermediate court's ruling is in conflict with both the Railway Labor Act and this Court's interpretation of the Act.

The Court of Appeals' rationale is faulty and should be corrected. Pretermitting the erroneous exercise of juris-

diction, the pivotal substantive issue is whether the provisions of the MOPAC-UTU collective bargaining agreement, limiting all switchmen, including those who were members of the BLE, to UTU representation at company level grievance and disciplinary proceedings, is valid under the RLA. The Court of Appeals decision recognized that no single provision of the RLA was dispositive of this issue. The court below acknowledged that its holding was an "attempt to divine Congressional intent and priorities"; its attempt failed. Nevertheless, the Court of Appeals extracted a legislative intent, though not stated in the RLA, that ostensibly precludes the language in the UTU/MOPAC collective bargaining agreement. Such judicial prescience is ill-founded and does not support the erroneous decision below.

Besides failing to reconcile its decision with the conflicting case law rendered by this Court, the Court of Appeals did not properly address the policy considerations of labor turmoil and circumvention of the RLA that will be fostered under its ruling.

REASONS FOR GRANTING THE PETITION

If this decision is allowed to stand, a situation detrimental to the most basic purpose and policy of the Railway Labor Act is created, namely, the resolution of labor disputes through experienced administrative agencies rather than a rush to the federal courthouse. The lower court's decision additionally encourages union skirmishes for more territory, rather than allowing the employer and employee to abide by the governing collective bargaining agreement to resolve labor issues. Coupled with these important policy considerations in the railroad labor area

is the existing division among courts with respect to whether members of a union are bound by their collective bargaining agreements with the Railroad. This Court's latest pronouncement is at odds with the Fifth Circuit's ruling below. In order to establish the demarcation line between the statutorily-created administrative agencies and the judiciary in the railroad labor field, this Court should grant certiorari and denote the proper parameters for the collective bargaining process.

More specifically, this Court should grant the present application for review because:

1. The Courts Below Erroneously Asserted Subject Matter Jurisdiction Over This Dispute.

The Railway Labor Act classifies labor disputes as "minor" or "major". Major disputes concern:

> [f]ormation of collective bargaining agreements or efforts to secure them. They arise whether there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy.

In contrast, a minor dispute:

> . . . contemplates the existence of a collective agreement already concluded. . . . [T]he dispute relates either to the meaning or proper application of the particular provision with reference to a specific situation or to an omitted case.

See, *Elgin, Joliet & Eastern Railroad v. Burley*, 325 U.S. 711, 723 (1945).

The initial step towards settling either type of dispute is not resort to the courts. It is negotiation. Major disputes under the Act go first to mediation under the auspices of the National Mediation Board; if that fails, then to the acceptance or rejection of arbitration, and lastly, to possible presidential intervention to secure adjustment. *Elgin, Joliet & Eastern Railroad v. Burley, supra; see, Brotherhood of Railroad Trainmen v. Toledo, P&W Railroad Co.*, 321 U.S. 50 (1944).

Minor disputes are handled quite differently. Section 153, First(i) of the Railway Labor Act provides that minor disputes at the company level arise:

> . . . out of the interpretation or application of agreements concerning rates of pay, roles or working conditions . . . and shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes.

If the employer and employees cannot resolve the pending labor dispute, the RLA provides that the disputes may be referred by petition of the parties or by either party to the appropriate division of the National Railroad Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes. Actions of the Adjustment Board are ". . . final and binding upon both parties to the dispute." 45 U.S.C. § 153, First(m).

Thus, the Railway Labor Act is designed to provide private consideration of issues of contract interpretation and union representation. However, the courts below, rather than classifying this dispute as either "major" or "minor", treated this dispute as a question regarding the validity of the MOPAC-UTU agreement, and on this

tenuous basis, the trial court asserted subject matter jurisdiction. Petitioner submits that this exercise of subject matter jurisdiction by the lower court was over-reaching and should be rectified by this Court.

As noted earlier, assertion of subject matter jurisdiction in this case is in direct conflict with the clear holdings of this Court as expressed in the 1943 trilogy of *Switchmen's Union v. Nat'l Mediation Board, supra; General Committee v. Missouri-Kansas-Texas Railroad Co., supra;* and *General Committee v. Southern Pacific Co., supra.* This grouping of cases reaffirmed the meaning of Section 152, Ninth of the Railway Labor Act to the effect that the courts should defer to the administrative tribunals established for this express purpose.

Respondents seek to have the federal courts substituted for the adminstrative remedies provided by the Railway Labor Act. This circumvention of the Act undermines Congress' efforts to maintain industrial self-government and labor peace under the RLA procedures.

2. A Conflict Exists Among the Federal Circuits as to the Railway Labor Act.

The substantive issue before the Fifth Circuit in this case was whether the Railway Labor Act provides that an employee can have a representative of his choice handle grievances at the company level, thereby rendering unenforceable collective bargaining agreement language designating the signatory union as the exclusive representative for the company level dispute.

In *Broady v. Illinois Central Railroad,* 199 F.2d 73 (7th Cir. 1951) and in *Butler v. Thompson,* 192 F.2d 831 (8th Cir. 1951), the Seventh and Eighth Circuits

concluded that the Railway Labor Act did not give employees the right to representatives of their own choice at company-level grievance and disciplinary proceedings. Although the Seventh Circuit in *McElroy* subsequently disallowed exclusive representation under a collective bargaining agreement, the ruling in *McElroy,* as the district court in this case acknowledged, was limited to a unique factual situation, which does not exist in the case *sub judice.*

Lack of agreement in the federal court system on the validity of exclusive representation clauses is wide spread. For example, in *Coar v. Metro-North Commuter Railroad,* 618 F. Supp. 380 (S.D. N.Y. 1985), the court held that an employee should have choice of representation at company-level proceedings. In contradistinction, the Court in *Landers v. Nat'l Railroad Passenger Corp.,* ____ F. Supp. ____ (D. Mass. 1986) held that the Railway Labor Act does not supersede the collective bargaining agreement to provide an employee with such unfettered discretion. Rejecting the argument that an employee can ignore the contractual, designation of his representative, the Court in *Landers* maintained the integrity of the collective bargaining agreement. The *Landers* ruling has been appealed, and if affirmed by the First Circuit, an additional appellate conflict will exist on whether this collective bargaining clause (Article 18), predetermining the employee representative, is invalid under the Railway Labor Act.

3. This Case Raises Important Public Questions of Labor Law.

The Railway Labor Act is designed to fit within the overall goals of federal labor law. Congress has always

intended to establish and maintain a uniform body of federal labor law directed toward industrial self-government and labor peace. The structural components of this policy are the construction of private dispute settling structures and adherence to the terms of a collective bargaining agreement. *See generally,* Archibald Cox, "Collective Bargaining During Contract," 63 Harv. L. Rev. 1097 (1950).

Union rivalry frustrates industrial self-government and labor harmony. If the exclusive representation clause of the collective bargaining contract is not enforced, each employee will be permitted to select his or her own representative for every company level grievance hearing. This effect is exacerbated by the existence of multiple unions at each facility.

The employees already have a voice in the selection of their representative through approval of the collective bargaining agreement. Abrogating the collectively bargained for provisions will result in labor chaos. The courts historically have recognized that the process of handling grievances is an integral part of collective bargaining, and, therefore, the concept of exclusive representation in the agreement confected between unions and employers must control. See, *Conley v. Gibson,* 355 U.S. 42 (1957). See also, *Andrews v. Louisville & N.R.R. Co.,* 406 U.S. 320 (1972); Cox, "Rights Under a Labor Agreement", 69 Harv. L. Rev. 601 (1956). The courts below did not heed this established tenet of labor management relations. Petitioner respectfully submits that the lower courts' rulings eviscerate the collective bargaining process in the railroad industry.

Grievance procedures specified in a collective bargaining agreement are not optional provisions for employees. They are binding contractual provisions that govern company proceedings and are subject to interpretive scrutiny only by the National Railroad Adjustment Board. *Andrews v. Louisville & N.R.R. Co., supra.* In *Andrews,* a wrongful discharge complaint was dismissed because the employee had failed to exhaust his remedies before the NRAB. This Court recognized that an employee is bound to accept the limitations, as well as the benefits, of a collective bargaining agreement. (See related discussion relative to the propriety of exclusive representation clauses in Section 4, *infra*). This principle, illustrated by this Court's ruling in *Andrews,* was noted approvingly by the district court in the instant case, but inexplicably neither court below chose to adhere to this well-established precept.

In *Hughes Tool Company v. National Labor Relations Board,* 147 F.2d 69 (5th Cir. 1945), the court noted that with respect to representation of an employee at a grievance hearing, the phrase " . . . representatives of their own choosing" was not made part of the National Labor Relations Act because this approach would be antithetical to labor harmony:

> It was not thought good to allow grievance hearings to become clashes between rival unions. We think an inexperienced griever can ask a more experienced friend to assist him, but he cannot present his grievance through any union except the representative. *Id.* at 73.

In the present case, neither the RLA nor the relevant collective bargaining provision employs the phrase " . . .

of their own choosing." The same reasoning espoused by the Fifth Circuit in *Hughes Tool* applied to the instant case. Instead of reaching a prompt resolution of a grievance at the company level, grievance hearings will merely provide the forum for jurisdictional competition among unions if the lower court's ruling is not corrected.

The ruling of the court below will create a situation in which it will be too facile for a rival union to influence and attempt to alter the provisions of a collective bargaining contract to which it is not a party, and which does not reflect the actual working conditions of its own craft. If the BLE is allowed to represent switchmen in UTU disciplinary and union grievance matters, nothing prevents the BLE from pursuing positions contrary to the oral and written understandings that exist between the UTU and MOPAC.

The legislative intent of the RLA, to the extent that it was to encourage freedom of association among employees and amicable resolution of labor grievances, did not extend to creating fertile ground for freewheeling union rivalry. If a union other than the signatory union, as a result of non-enforcement of exclusivity provisions, is able to decide which cases to pursue or is able to offer conflicting interpretations of provisions of the signatory's contract, the non-signatory union will be encouraged to pursue frivolous claims or grievances normally not pursued by the signatory union in an effort to improve the non-signatory's appeal to employees. MOPAC, as any other carrier, would be impeded in achieving meaningful, long term collective bargaining agreements with unions. Inconsistent results in disciplinary and grievance matters arising from identical contractual provisions would

quickly flourish. The ensuing unfairness would inevitably lead to labor unrest and interruptions of commerce, and the precise purpose of the RLA will be wholly thwarted. The BLE will be placed in the unusual and non-productive position of being required to interpret UTU agreements with MOPAC whenever the BLE represents a switchman. MOPAC and every other railroad will be left in the middle of what is rapidly evolving into an eternal turf battle between rival unions seeking to attract new members. For these reasons, this Court should correct the erroneous decisions by the intermediate court.

In the instant case, sixteen separate unions have sixteen separate agreements with MOPAC. If every employee is free to be represented by a representative "of his own choosing" at a company-level grievance proceeding, MOPAC is faced with sixteen unions competing with each other to represent that employee. Under these circumstances, the collective bargaining agreement between MOPAC and the UTU, as well as other unions, would be virtually worthless. The affidavit of O. B. Sayers, MOPAC's Vice President for Labor Relations, set forth the only evidence presented to the trial court as to the adverse effect of multiple union handling of grievances upon labor stability; the Sayers affidavit established that permitting grievances to be handled by more than one union will quickly destabilize labor relations. (Affidavit of O. B. Sayers, ¶ 1, §§ 19-25, which is attached as Appendix F).

The Railway Labor Act contains measures to permit union employees a broad range of choice in selecting their representatives at grievance hearings. However, the employees' selection of a representative cannot be un-

fettered. After the employees have chosen their designated representative by means of a collective bargaining agreement, they should not be free to vitiate the union majority's choice. Otherwise, a virtual donnybrook between rival unions will be created if the exclusivity provisions, such as the one in Article 18 of the MOPAC-UTU collective bargaining agreement, is nullified by the court's ruling.

4. The Railway Labor Act does not bar exclusive representation provisions of a collective bargaining agreement and does not establish the right of an employee to be represented by his own union in all company-level grievance hearings.

Section 152, Second, of the RLA, when read together with Section 152, Fourth, of the Act, reveals that the statutory method for designating a representative for collective bargaining purposes is by majority vote of those employees interested in the bargaining. The collective bargaining agent so chosen is the exclusive representative of the union's employees with respect to all facets of bargaining. Exclusivity in this respect is a tradition which has long lent stability to labor relations. (See Sayers Affidavit, Appendix F)

The right to belong to the union of one's choice does not automatically include the subsidiary right of totally free choice as to representation in company-level disputes. *See, e.g., Landers v. Nat'l Railroad Passenger Corp., supra.* The court below erred by failing to recognize this balancing concept inherent in the RLA.

Analysis of the RLA reveals that there is no statutory basis for individual choice in selecting a representative

for company-level grievance handling when a collective barganing agreement has been approved by the union workers. Because Section 153, First(j) of the RLA sets forth that disputes must be handled by the National Railroad Adjustment Board (NRAB), the specificity of that language demonstrates that Congress was capable of expressing, and did express, exactly how representation under the Act should be handled. Section 153, First(i) of the Act, providing that company-level disputes should be resolved in the "usual manner," discloses that Congress did not intend to afford union members absolute choice in representation at the company level. Nothing in the Railway Labor Act can be construed as a bar to an exclusive representation clause in favor of the craft signatory to the collective bargaining contract. See, *Landers v. Nat'l Railroad Passenger Corp., supra; Butler v. Thompson, supra.*

The judiciary should not fail to recognize the long-settled principle that resolution of particular grievances and disciplinary issues, even if many are strictly personal to an employee and do not directly touch the overall interests of a union or craft, ultimately do affect the administration of a collective bargaining agreement, and will ultimately reach those interests. Individual resolutions of grievances, in time, become precedents by which later disputes are decided. *Republic Steel Corp. v. Maddox,* 370 U.S. 650, 85 S. Ct. 614, 13 L.Ed.2d 580 (1965); *Landers, supra*; Cox, "Duty to Bargain Collectively During the Term of an Existing Agreement," 63 Harv. L. Rev. 1097, 1100 (1950). Hence, the need for enforcement of the collective bargaining agreement is apparent; adherence to this contractual undertaking between MOPAC and the unions preserves labor peace and permits self-governance.

5. The Decision Below is Not Supported by this Court's Jurisprudence.

McElroy v. Terminal Railroad Association of St. Louis, 392 F.2d 966 (7th Cir. 1968), is the primary jurisprudential authority for the decision below. Though the Fifth Circuit relied upon the district court decision in *Coar v. Metro-North Commuter Railroad and Brotherhood of Locomotive Engineers,* 618 F. Supp. 380 (S.D. N.Y. 1985) (which was not binding upon the Fifth Circuit), the district court in *Coar* merely piggybacked upon *McElroy*. Yet *McElroy* is factually different from the present case, and more significantly, the factual situation in *McElroy* was an historical anomaly. The employees in *McElroy* constantly shuttled back and forth between two crafts depending upon the needs of the carrier; such are not the facts in the present case. In a shuttling situation, the "usual manner" under 45 U.S.C. § 153 conceivably could allow for nonexclusive representation for handling of grievances at the company level. If the employee does not shuttle between crafts, the peculiar reasoning by the court in *McElroy* does not apply and the collective bargaining procedures must be followed. The court below erred by failing to appreciate this critical distinction, and, as a result, union rivalry will proliferate.

In this case, as in *Landers,* the original company-level disputes occurred while the employees were working as switchmen. The UTU represents all switchmen under its collective bargaining agreement with MOPAC, while the BLE is the bargaining agent for locomotive engineers. Thus, it is undisputed from the record that shuttling between crafts does not exist in this case. Without a finding of shuttling, the Fifth Circuit erred by relying upon the

rationale in *McElroy*. Hence, the Court of Appeals' ruling is directly contrary to the RLA.

The holding by the Seventh Circuit in *McElroy* has been inappropriately expanded by the court below. This expansion is simply wrong under existing case law. Such an erroneous ruling on an important labor concept must be rectified to avoid the destruction of the collective bargaining process.

CONCLUSION

MOPAC respectfully requests this Court to grant its petition for a writ of certiorari in order to maintain labor peace and comply with the statutory directives of the Railway Labor Act. Review by this Court is warranted so that labor/management disputes in the railroad industry can be resolved by mediation, as contemplated by Congress when it enacted the Railway Labor Act, and without court intercession. The division among courts on the important labor policy of whether exclusive representation clauses violate the RLA make it essential that this Court grant the instant application for certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 21st day of October, 1986, served three copies of the foregoing Petition upon the following, by placing same in the United States mail, properly addressed and first class postage prepaid:

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APPENDIX A

W. G. TAYLOR, et al.,
Plaintiffs-Appellees,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
et al., Defendants-Appellants.

No. 85-3519.

United States Court of Appeals,
Fifth Circuit.

July 23, 1986.

Railroad switchmen who were members of engineers union rather than switchmen's union brought action seeking declaration that exclusive representation provisions of collective bargaining agreement between railroad and switchmen's union violated their rights under Railway Labor Act and seeking injunction prohibiting enforcement of the provisions. The United States District Court for the Eastern District of Louisiana, Adrian G. Duplantier, J., 614 F.Supp. 1320, granted the requested relief, and railroad appealed. The Court of Appeals, Politz, Circuit Judge, held that: (1) district court had subject matter jurisdiction, and (2) exclusive representation provisions of switchmen's union's collective bargaining agreements were invalid as applied.

Affirmed.

Norton N. Newborn, Cleveland Ohio, for United Trans.

Harry A. Rosenberg, Phelps, Dunbar, et al., New Orleans, La., for Missouri Pacific Railroad Co.

Harold A. Ross, Cleveland, Ohio, Louis L. Robein, Metaire, La., for plaintiffs-appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GEE, POLITZ, and GARWOOD, Circuit Judges.

POLITZ, Circuit Judge:

The district court granted declaratory and injunctive relief sought by four individual plaintiffs and by the Brotherhood of Locomotive Engineers (BLE) pursuant to the Railway Labor Act (RLA), 45 U.S.C. §§ 151 *et seq.* 614 F.Supp. 1320 (E.D. La. 1985). Defendants Missouri Pacific Railroad Company (MOPAC) and the United Transportation Union (UTU) appeal, challenging the court's jurisdiction and its contractual interpretation. Concluding that the court had jurisdiction over the subject matter, that the claims are justiciable, and that the district court was correct in its analysis, we affirm.

BACKGROUND

The four individual plaintiffs are employees of MOPAC and members of BLE, a craft union that is the exclusive bargaining representative for MOPAC's locomotive engineers. The individual plaintiffs are not engineers, however, but switchmen in MOPAC's Avondale, Louisiana yard, enjoying only a "first preference" to trans-

fer into engine service. UTU is certified as the exclusive bargaining representative for MOPAC's switchmen.

During 1983 and 1984 the individual plaintiffs were involved in company-level disciplinary or grievance proceedings. In each instance they requested representation by the BLE. MOPAC refused these requests on the grounds that the MOPAC-UTU collective bargaining agreement specified that only the UTU could represent a switchman at company-level disciplinary and grievance hearings.

The instant complaint sought: (1) a declaration that the provisions of the MOPAC-UTU collective bargaining agreement limiting switchmen to UTU representation at company-level proceedings violated the individual plaintiffs' rights under the RLA; (2) an injunction prohibiting enforcement of these provisions; and (3) damages, a claim subsequently waived.

MOPAC moved to dismiss the complaint, contending that the district court lacked jurisdiction because the claims involved disputes within the exclusive jurisdiction of the National Mediation Board (NMB), the National Railroad Adjustment Board (NRAB), or a special adjustment board. The district court found jurisdiction and, on the parties' cross-motions for summary judgment, held for the plaintiffs in a scholarly and comprehensive opinion. To the extent that the MOPAC-UTU exclusive representation provisions prevented a switchman from selecting his own union to represent him at company-level proceedings, the provisions were declared void and their enforcement enjoined.[1] MOPAC and UTU appeal.

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1. The injunction was made prospective only since the claims of the individual plaintiffs had been mooted.

ANALYSIS

Subject-matter Jurisdiction

Contending that the dispute at bar falls within the exclusive jurisdiction of the NMB, NRAB, or a special adjustment board, MOPAC challenges the court's jurisdiction over the subject matter. The point deserves serious consideration and discussion.

[1] Under the RLA, disputes between an employer and its employees, and the union representing the employees, are characterized as "major," "minor," or "representation." Under 45 U.S.C. § 153 First (i), minor disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . may be referred . . . to the [National Railroad] Adjustment Board. . . ." *See generally International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157 (5th Cir. 1983) (*"IBT v. TIA"*). MOPAC vigorously maintains that plaintiffs' claims involve the interpretation of the MOPAC-UTU collective bargaining agreement. Notwithstanding MOPAC's skillful argument to the contrary, we conclude that the pertinent contractual provisions, reprinted in 614 F.Supp. at 1325-26, are clear and unambiguous and require no interpretation. Accordingly, the NRAB has no jurisdiction over plaintiffs' claims, and, *a fortiori,* neither would a special adjustment board. 45 U.S.C. § 153 Second (special adjustment board may decide "disputes of the character specified in" 45 U.S.C. § 153).[2]

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2. MOPAC does not argue that the instant claims present a "major dispute" under the RLA. *See* 45 U.S.C. § 156; *IBT v. TIA.*

MOPAC's argument that the plaintiffs' claims fall within the exclusive jurisdiction of the NMB is more substantial. The NMB has exclusive jurisdiction over representation disputes involving the determination of the proper representative of a class of employees. 45 U.S.C. § 152 Ninth; *IBT v. TIA*. At first blush, a functional analysis would reflect that MOPAC's position is sound. By gaining BLE representation at company-level proceedings, the argument posits, the plaintiffs could trigger a conflict between the BLE and the UTU. BLE representation of BLE-represented switchmen at company-level proceedings could, conceivably, undercut UTU's position as the exclusive bargaining representative of the switchmen. Were such a dispute between BLE and UTU to occur, and were it to implicate UTU's bargaining position, we would be faced with a representation dispute within the NMB's exclusive jurisdiction. That is not, however, the situation presented by the instant case.

[2] As the district court astutely recognized, it is the plaintiffs' position that the exclusive representation provisions at bar are *invalid* when applied to hearings involving switchmen who are not members of the UTU. Whether a provision of a collective bargaining agreement is valid is a legal decision, classic grist for the judicial mill. *Felter v. Southern Pacific Co.*, 359 U.S. 326, 79 S. Ct. 847, 3 L.Ed.2d 854 (1959). The district court properly took jurisdiction over this case. 614 F.Supp. at 1322. *Accord McElroy v. Terminal Railroad Ass'n of St. Louis*, 392 F.2d 966 (7th Cir. 1968), *cert. denied*, 393 U.S. 1015, 89 S. Ct. 610, 21 L.Ed.2d 559 (1969); *Coar v. Metro-North Commuter R. Co.*, 618 F.Supp. 380 (S.D.N.Y. 1985).

Right of Representation

[3] The issue posed by this appeal is whether the provisions of the MOPAC-UTU collective bargaining agreement, limiting all switchmen, including those who are members of the BLE, to UTU representation at company-level grievance and disciplinary proceedings, are valid under the RLA. Finding no single provision of the RLA dispositive of this issue, we must attempt to divine congressional intent and priorities.

The general purposes of the RLA are set out in 45 U.S.C. § 151a:

> The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

In addition to the prohibition on "any limitation upon freedom of association among employees" contained in 45 U.S.C. § 151a(2), Section 2 Eleventh (c) of the RLA, 45 U.S.C. § 152 Eleventh (c), provides that while a collective bargaining agreement may require an employee to belong to a national labor union as a condition

of employment, it cannot mandate which union. These provisions persuade us that Congress attached significant importance to an employee's freedom to choose his or her representative and to belong to the union preferred by the employee.

The right to associate freely with a national union of an employee's own choosing, and the effects of the exercise of that right, however, are not unlimited. In the instant case, for example, the BLE switchmen are not entitled to have BLE negotiate a separate collective bargaining agreement for them; rather, the terms and conditions of their employment necessarily are governed by the MOPAC-UTU agreement covering switchmen. *See, e.g., Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 65 S. Ct. 226, 89 L.Ed. 173 (1944). On the other hand, given the apparent importance Congress attached to freedom of choice, that right should be limited only when compelled by express language of the RLA. We find neither statutory language mandating such a result nor compelling reason to limit the right of free choice in the instant case. Indeed, we perceive the opposite.

In exercising the freedom to choose membership in a national union, an employee may consider myriad factors: some personal, some business-related; some apparent, others less apparent; some objectively, soundly based, others perhaps questionable; all reflecting the essence of free choice. An employee selecting a union opts for the benefits, burdens, and costs attendant upon membership in that union. In return, the union owes the member certain duties. The relationship is symbiotic. An obvious and primary benefit to the employee is the right to have the chosen union provide personal representation in any dispute the employee might have with the employer. Such

typically are matters of great interest and concern to the individual employee.

Because the UTU was the exclusive bargaining agent for MOPAC's switchmen during the contract-negotiation process, the benefits of membership in the BLE were necessarily sublimated. To extend that sublimation beyond contract negotiation to include company-level grievance and disciplinary proceedings would render membership in the BLE nugatory, and make that union the equivalent of a social organization rather than a vital national labor union of railroad employees. That extension would effectively nullify the RLA's specific emphasis on the employee's freedom to choose a union in situations as are here presented.

The district court's decision manifestly is consistent with the stated goals of the RLA. Only specific language of the RLA would warrant rejecting the trial court's findings and conclusions. We have been cited to no such language, and find none.

The RLA provision applicable to company-level proceedings is § 2 Second, 45 U.S.C. § 152 Second, which provides:

> All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

The language pertinent to the instant inquiry is "representatives designated and authorized . . . to confer . . . by the employees . . . interested in the dispute." Does

this language refer only to the certified bargaining agent, or does it include the national union to which the employee belongs? We are persuaded to the latter.

Under this statute, company-level proceedings are to involve a representative "designated . . . by the employees . . . interested in the dispute." The reference is not generic, it is individualized. The craft or body of switchmen might be interested only inferentially in a particular disciplinary or grievance hearing, which might be entirely fact-bound with no overriding policy implications. The individual, in such an instance, would have a vital interest; that individual is the employee "interested in the dispute." The individual should be permitted to select his or her representative. Only in that manner would the heralded right to free selection of union membership be accorded the status and dignity explicit and implicit in the relevant statutes.

We conclude by noting that our decision today accords with the holdings or leanings of our colleagues in the Seventh, Eighth, and Tenth Circuits. *McElroy; General Committee of Adjustment v. Burlington Northern, Inc.*, 503 F.2d 1279 (8th Cir. 1977); *Brotherhood of Locomotive Engineers v. Denver & R.G.W.R. Co.*, 411 F.2d 1115 (10th Cir. 1969); *accord Coar.* We further note that our holding today creates no conflict between the RLA policy of freedom of union choice for the employee and the stated goals of company-level settlement of disputes, 45 U.S.C. § 152 First, and the transcending desire for labor-management stability. *See Coar*, 618 F.Supp. at 384 (quoting pertinent congressional testimony).

The judgment of the district court is AFFIRMED.

APPENDIX B

W.G. TAYLOR, K.P. Brockhoeft, A.J. Ruiz, Wayne A. Sepcich and Brotherhood of Locomotive Engineers

v.

MISSOURI PACIFIC RR CO. and United Transportation Union.

Civ. A. No. 84-700.

United States District Court, E.D. Louisiana.

March 20, 1985.

Railway union and individual members brought action seeking declaration that exclusive representation provisions of agreements between railway and econd union violated employees' rights under Railway Labor Act and were null and void. The District Court, Duplantier, J., held that Railway Labor Act rendered null and unenforceable exclusive representation provisions of agreements insofar as they prevent member of railway union from seeking his own union rather than bargaining representative union of craft in which he was working to assist him at company level proceedings.

Order accordingly.

Harold A. Ross, Cleveland, Ohio, Louis L. Robein, Jr., Metairie, La., for plaintiffs.

Dennis M. Angelico, New Orleans, La., Norton N. Newborn, Cleveland, Ohio, for United Transp. Union.

Harry & Rosenberg, New Orleans, La., for Missouri Pacific R.R. Co.

ORDER AND REASONS

DUPLANTIER, District Judge.

Plaintiffs Taylor, Brockhoeft, Ruiz and Sepcich are railway workers employed by defendant Missouri Pacific Railroad Company ("MOPAC"). Plaintiff Brotherhood of Locomotive Engineers ("BLE"), of which the individual plaintiffs are members, is the collective bargaining representative pursuant to the Railway Labor Act ("RLA" or "Act"), 45 U.S.C. §§ 151-163 (1972), for the craft of locomotive engineers employed by MOPAC. Defendant United Transportation Union ("UTU") is the collective bargaining representative for the crafts of switchmen and firemen employed by MOPAC. The rates of pay, rules, and working conditions for the crafts employed by MOPAC are established by agreement between MOPAC and the collective bargaining representative of each respective craft. Although the individual plaintiffs are members of BLE, the engineer's collective representative, they work principally as switchmen.

At various times during late 1983 and early 1984 the individual plaintiffs either were subjects of MOPAC disciplinary proceedings or filed grievances with MOPAC. In all instances, the grievances and disciplinary

proceedings concerned the plaintiffs' services as switchmen.

The individual plaintiffs sought representation by their union, BLE, at the MOPAC disciplinary and grievance proceedings. MOPAC, however, refused their requests, basing its position on provisions of two collective bargaining agreements between MOPAC and UTU that establish terms and conditions of employment for MOPAC switchmen: Articles 18 and 23 of the January 1, 1974, Agreement and Section 17 of the August 11, 1948, Agreement. (*See* Appendix). The parties to this suit agree that these provisions are intended to limit a switchman's choice of representatives before a disciplinary or grievance proceeding to himself or a UTU representative, even though that switchman may be a member of BLE rather than UTU. Thus, the provisions vest in UTU an exclusive right to represent MOPAC employees in proceedings concerning switchmen services.

The individual plaintiffs, joined by BLE, instituted this action in which they seek a declaration that the exclusive representation provisions of the UTU/MOPAC agreements violate employees' rights under the RLA and are null and void insofar as they restrict plaintiffs' rights to have their grievances and disciplinary matters handled at all levels by BLE representatives.[1] We now consider extensively briefed cross motions for summary judgment filed by plaintiffs and by defendant UTU.

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1. We defer consideration of further relief sought by plaintiff, including prospective injunctive relief, the nullification of the proceedings at which plaintiffs were denied BLE representation, and BLE's claim for damages against MOPAC for loss of membership resulting from MOPAC's refusal to treat with BLE representatives.

[1] Defendant MOPAC opposes both motions for summary judgment. To the extent that MOPAC's opposition resurrects the question of this court's jurisdiction to adjudicate this labor dispute, we reiterate our ruling on MOPAC's previously considered motion to dismiss. Contrary to MOPAC's contentions, this case does not present a "major dispute" regarding the jurisdiction of competing unions over which the National Mediation Board has exclusive jurisdiction. RLA Section 2, Ninth (45 U.S.C. § 152, Ninth). This case presents no issue about UTU's authority to make agreements with MOPAC relating to the working conditions, rules, and pay of MOPAC switchmen. *See Elgin, J. & E. Ry. Co. v. Burley,* 325 U.S. 711, 65 S. Ct. 1282, 89 L.Ed. 1886 (1945). Nor is this matter a "minor dispute" arising out of a grievance or dispute regarding the interpretation or application of a collective bargaining agreement provision, over which the National Railroad Adjustment Board, RLA Section 3, First (i), or alternatively, a Special Adjustment Board, RLA Section 3, Second, may have exclusive jurisdiction. The parties agree that the challenged provisions of the UTU/MOPAC agreements purport to create an exclusive right of UTU to represent switchmen at all MOPAC company level proceedings. The issue presented is whether these exclusive representation provisions can prevent a member of the BLE from choosing as his representative at a company level grievance or disciplinary proceeding a BLE union official, in view of the rights of employees under the RLA. Since the issue is one of validity, not interpretation, it is for judicial consideration. *See Felter v. Southern Pacific Co.,* 359 U.S. 326, 327 n. 3, 79 S. Ct. 847, 850 n. 3, 3 L.Ed.2d 854 (1959); *Order of Railway Conductors & Brakemen v. Switchmen's Union of North*

America, 269 F.2d 726 (5th Cir. 1959). Nothing in the RLA restricts the court's jurisdiction to determine whether the exclusive representation provisions of the UTU/MOPAC agreements are valid.

[2] The factual disputes are minimal and, in any event, immaterial. The resolution of this matter turns on a pure question of law. Therefore, the case is ripe for summary judgment. We conclude that plaintiffs are entitled to relief and order judgment accordingly.

At the outset of our analysis we note that the language of the Act provides no clear answer to the question before us. Furthermore, we find no binding precedent. Indeed, of the several reported decisions concerning representational rights in minor disputes, only two directly address the narrow question with which we are concerned: an employee's right under the Act to designate as his representative at company level dispute proceedings the railway union of which he is a member but which is not the certified bargaining representative of the craft in which he was working at the time the dispute arose. *See McElroy v. Terminal Railroad Association of St. Louis,* 392 F.2d 966 (7th Cir. 1968), *cert. den.,* 393 U.S. 1015, 89 S. Ct. 610, 21 L.Ed.2d 559 (1969); *General Committee of Adjustment of Brotherhood of Locomotive Engineers for Pacific Lines of Southern Pacific Co. v. Southern Pac. Co.,* 132 F.2d 194 (9th Cir.), *rev'd on other grounds,* 320 U.S. 338, 64 S. Ct. 142, 88 L.Ed. 85 (1943). Only one case, *McElroy,* is an action by a member of one craft union seeking to nullify the exclusive representation agreement between the employer and the collective bargaining agent union for the craft in which the employee was working when the dispute arose.

Absent prohibition by the Act, the exclusive representation agreements would be valid and enforceable contractual provisions, although they prevent an employee from having his own union represent him at company level proceedings involving a labor contract with a different union. The reported decisions interpreting the Act vis-a-vis an employee's choice of representative exemplify the diverse interpretations to which the Act lends itself. The disparate results and reasoning in these decisions suggest two reasonable assessments of the Act. First, the Act's failure to address the specific issue before us may be caused by the failure of the drafters to anticipate such a dispute. Alternatively, Congress might have intended a definite stance on the issue; if so, the draftsmanship of the Act is wanting in clarity.

[3] Reading the language of the Act "not in a vacuum, but in the light of the policies [it] was intended to serve," *Pennsylvania R.R. Co. v. Rychlik,* 352 U.S. 480, 488, 77 S. Ct. 421, 425, 1 L.Ed.2d 480 (1957), we conclude that under the Act the individual plaintiffs are entitled to designate their union, BLE, to represent them in company level proceedings notwithstanding the UTU/MOPAC agreements to the contrary. We hold that the Act renders null and unenforceable the exclusive representation provisions of the UTU/MOPAC agreements insofar as they prevent a member of a railway union from selecting his own union rather than the bargaining representative union of the craft in which he is working to assist him at company level proceedings. We do not pass upon the question of whether an employee has a right under the Act to select any person or organization other than his own union as his representative at company level proceedings.

The general purposes of the Act are delineated in RLA Section 2 (45 U.S.C. § 151a). Section 2 reflects the congressional intent to create and maintain stable relations between labor and management in a vital national industry. *See Brotherhood of R.R. Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30, 77 S. Ct. 635, 1 L.Ed.2d 622 (1957). One of the specific objectives of the Act is to forbid "any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization." RLA Section 2(2) (45 U.S.C. § 151a(2)). Inherent in the right of an employee to join a railway employees labor union of his choice is the right to enjoy fully the fundamental benefits of union membership. It is difficult to conceive of a benefit of union membership more fundamental than union representation in employee/employer dispute proceedings.

In the 1951 amendments to the Act concerning union shops in the railroad industry, Congress reaffirmed each employee's right to belong to a railway union of his choice. Through Section 2, Eleventh, Congress allowed carriers and unions to establish union shop requirements, which make membership in a union a condition of employment. However, a typical union shop agreement could cause significant problems because of an unusual characteristic of the railroad industry: the shuttling back and forth between crafts (and union jurisdiction) of employees traditionally organized along craft lines. To forestall such problems, Congress included in the union shop section of the Act a specific provision to the effect that membership in any railway employees union national in scope satifies the union membership requirement of any other such union's contract with the employer. "The require-

ment of membership in a labor organization in an agreement . . . shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service . . . if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter, and admitting to membership employees of a craft or class in any of said services. . . ." RLA Section 2, Eleventh (c) (45 U.S.C. § 152, Eleventh (c)). It is not disputed that both UTU and BLE are the type of labor organizations referred to in the quoted provision.

This recognition of an employee's right to maintain his union membership while working in a craft not represented by his union was designed to protect employees from the expense of being required to belong to more than one union or the likely loss of union benefits that would result if an employee were required periodically to shift his union membership. *See Rychlik, supra,* 352 U.S. at 490, 77 S. Ct., at 426. In *Rychlik* the Supreme Court noted that by this provision of the Act Congress conferred upon qualified craft unions the right to "assure members employment security, even if a member should be working temporarily in a craft for which another union is the bargaining representative." *Id.* The observe of the Court's observation is that the provision gives union members the right to be assisted by their union in employment security matters. Grievance and disciplinary proceedings arising out of work in a craft for which another union is the bargaining representative clearly fall within the purview of employment security.

Section 2 and Section 2, Eleventh (c) would clearly prohibit UTU from contracting with MOPAC to prohibit

MOPAC employees working within UTU's craft from joining BLE. Congress conferred upon the plaintiff employees a right to belong to BLE. It follows, then, that UTU and MOPAC cannot lawfully contract to strip MOPAC employees of a basic privilege of union membership. The employee's right to belong to a union of his choice would be hollow if this court enforced a contract between the employer and a rival union which stripped the employee of his right to have his union represent him at company level dispute proceedings with the employer.

No provision in the Act appears to address specifically the issue before us. The language of the Act is notably ambiguous in its many references to the "representative" of an employee. Section 2, Sixth typifies the ambiguity of the Act:

> In case of a dispute between a carrier and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the *designated representative* of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held. RLA Section 2, Sixth (45 U.S.C. § 152, Sixth). (emphasis added).

The defendants argue, with some logic, that "designated representative" refers to the certified collective bargaining representatives of the employee's craft. On the other hand, "designated representative" reasonably may be interpreted to mean a representative of the union "designated" by the employee, the union of which he is a member. The

Act gives that membership special status; in the spirit of the Act, we adopt the interpretation of the above quoted language which gives full measure to the protected union membership.

There is merit to the defendants' contention that an employee who enjoys the benefits of a collective bargaining agreement must accept the limitations established by that agreement, including exclusive representation provisions. That logical argument must yield to the compelling evidence of Congress's intent to assure each employee the right to enjoy unimpeded the privileges and benefits of membership in the union of his choice.

Our conclusion fosters the Act's explicit objective of providing for the prompt settlement at the company level of all disputes growing out of the application or interpretation of collective bargaining agreements. RLA Section 2(4) and Section 2, First and Second (45 U.S.C. § 151a (4) and § 152, First and Second). *See General Committee v. Southern Pacific Co., supra,* 132 F.2d at 198. When an employee elects to be a member of one union rather than another, he is, among other things, designating the union representative in which he wishes to place his trust and confidence with respect to employment matters. The employee reaffirms his preference when he designates his union to represent him at company level dispute proceedings, as the individual plaintiffs did in this case. This relationship of trust and confidence surely will facilitate the dispute resolution process. *Id.* Although representation by a different union pursuant to an exclusive representation provision may yield similar results, the likelihood of settlement at the company level is certainly greater when the employee is represented by his own union.

The defendants assert that the exclusive representation requirement is a necessary and desirable means for a collective bargaining representative to protect the intergrity of the collective bargaining agreement. Even minor dispute resolution at the company level implicates the duty of the collective agent to negotiate and protect the terms of employment for the craft it represents, because the resolution of minor disputes often turns on interpretations of the collective agreement. In some instances the resolution of a minor dispute may have implications broader than the immediate case by influencing the practical application of the collective agreement in subsequent cases. *See, e.g., Elgin, J. & E. Ry. Co. v. Burley,* 325 U.S. 711, 729-41, 65 S. Ct. 1282, 1292-98 (1945); *General Committee of Adjustment, United Transportation Union v. Burlington Northern, Inc.,* 563 F.2d 1279 (8th Cir. 1977), *cert. denied,* 449 U.S. 826, 101 S. Ct. 88, 66 L.Ed.2d 29 (1980). However, the resolution of many minor disputes at the company level depends upon factual determinations rather than novel interpretations or applications of the collective agreement.

In any event, our ruling does not interfere with the collective bargaining representative's ability to perform its duties. A craft representative may be a necessary party to a company level proceeding potentially affecting other employees, even though the employee directly involved has designated his own union to represent him. We certainly do not hold that the craft representative must be excluded from the company level proceedings in those instances; the craft representative's participation protects the interests and obligations of the collective bargaining union to represent the craft which it is designated to represent. *Accord Burley, supra,* 325 U.S. at

737 n. 35, 65 S. Ct. at 1296-96 n. 35. (to exclude the collective agent from any voice whatever in the collective agreement's interpretation would go too far toward destroying its uniform applications); *McElroy, supra,* at 972 (a "right to participate clause" in union/carrier agreements may be permissible). Furthermore, because the carrier may not unilaterally alter the terms of a collective agreement, the carrier should follow precedent established in proceedings with the collective agent. *See Burlington Northern, supra,* 563 F.2d at 1284.

For the foregoing reasons, we hold that the exclusive representation provisions in the UTU/MOPAC agreements are inapplicable to the individual plaintiffs in this case and do not bar them from having BLE representation at company level dispute proceedings. We will enter judgment in accordance with these findings.

APPENDIX

AGREEMENT

between

TEXAS PACIFIC-MISSOURI PACIFIC TERMINAL RAILROAD OF NEW ORLEANS

and the

UNITED TRANSPORTATION UNION

Schedule of Pay Allowed and Rules Governing Switchmen

Reprinted

January 1, 1974

ARTICLE 18

Discipline and Grievances

(a) No employee covered by this agreement will be suspended, discharged, or unfavorable entries made against his record without just and sufficient cause, and not until he has had a fair and impartial investigation. Investigations will be held promptly, ordinarily within ten (10) days after the offense has been committed, to which a decision in writing will be rendered within ten (10) days after the investigation or the case will be considered closed. When brought to trial for any offense, the charge will be specified in writing, and the employe charged shall have the right to have another employe covered by this agreement, or a duly accredited representative of the UTU to assist at such investigation, and to procure witnesses to testify in his defense, to examine all papers used in the investigation, and to question all

persons giving evidence in his case. The employe charged and his representative will be furnished a copy of the transcript of the investigation on request. In case he is not satisfied with the result of said investigation, he shall have the right to appeal within ten (10) days, to his superior officer in person, or through his representative, as above specified. (T-32141)

(b) In case his suspension or dismissal is found to be unjust. he shall be reinstated and paid for all time lost. All complaints made by one employe against another, covered by this agreement, must be made in writing.

(c) If an employe is asked to sign a statement, the contents of same should be made entirely clear to him and a copy of such statement furnished to him, if desired.

(d) In the handling of grievances, including time claims, the chairman will inform the officer rendering decision within a reasonable time when a decision is accepted; in the event question in dispute has been handled with the officer having final authority, and his decision is not acceptable, the chairman will so notify him of this fact within a reasonable time.

ARTICLE 23

Representation and Rulings

(a) The right to negotiate and interpret schedule rules and agreements covering rates of pay and working conditions of employees covered by this agreement, is vested in the General Grievance Committee of the UTU and the Railroad.

(b) The right of employees covered by this agreement to have the regularly constituted committee of his organ-

ization represent him in the handling of his grievances under the recognized interpretation placed upon the agreement involved between the officials of the Railroad and the General Grievance Committee making same is conceded.

(c) Any rulings made with reference to any Article enumerated herein by the proper Official of the Railroad will be made in writing, and the Chairman of the General Grievance Committee, UTU, will be furnished a copy of said ruling, but said ruling shall not be made effective until agreed to between the parties herein mentioned.

(d) This agreement as rewritten is effective 1-1-74 and supersedes Yard Agreement effective 10-7-57 with the understanding that other written agreements and settlements on matters not covered by this rewritten agreement are not cancelled and that written agreements, rulings, settlements, and interpretations and decisions and awards of tribunals authorized to represent the parties hereto interpreting the rules of the agreement named herein are not superseded by this rewritten agreement.

This agreement shall remain in effect until and unless changed in accordance with the Railway Labor Act. Revised January 1, 1974.

AGREEMENT—August 11, 1948

SECTION 17—TIME LIMIT ON CLAIMS

Section 17—Time Limit on Claims.

* * * * * *

(a) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the

officer of the company authorized to receive same, within sixty days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within sixty days from the date same is filed, notify the employe or his representative of the reasons for such disallowance. If not so notified, the claim or grievance shall be considered valid and settled accordingly, but this shall not be considered as a precedent or waiver of the contentions of the carrier as to other similar claims or grievances.

(b) If a disallowed claim or grievance is to be appealed, such appeal must be taken within sixty days from receipt of notice of disallowance, and the representative of the carrier shall be notified of the rejection of his decision. Failing to comply with this provision the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employes as to other similar claims or grievances.

(c) The procedure outlined in paragraphs (a) and (b) shall govern in appeals taken to each succeeding officer. Decision by the highest officer designated to handle claims and grievances shall be final and binding unless within sixty days after written notice of the decision of said officer he is notified in writing that his decision is not accepted. All claims or grievances involved in a decision of the highest officer shall be barred unless within six months from the date of said officer's decision proceedings are instituted by the employee or his duly authorized representative before a tribunal having jurisdiction pursuant to law or agreement of the claim or grievance involved. It is understood, however, that the parties may by agreement in any particular case extend the six months period herein referred to.

(d) All rights of a claimant involved in continuing alleged violations of agreement shall, under this rule, be fully protected by continuing to file a claim or grievance for each occurrence (or tour of duty) up to the time when such claim or grievance is disallowed by the first officer of the carrier. With respect to claims and grievances involving an employe held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.

(e) This rule recognizes the right of representatives of the organizations parties hereto to file and prosecute claims and grievances for and on behalf of the employes they represent.

(f) This rule shall not apply to requests for leniency.

APPENDIX C

RAILWAY LABOR ACT

45 U.S.C. § 151

§ 151. *Definitions*

When used in this chapter and section 225 of Title 28 and for the purposes of said chapter and section—

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

45 U.S.C. § 152

§ 152. *General duties—Duty of carriers and employees to settle disputes*

Consideration of disputes by representatives

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to

join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Disputes as to identity of representatives; designation by Mediation Board; secret elections

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of

their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

45 U.S.C. § 153

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the awards in the light of the dispute.

PART 1206—HANDLING REPRESENTATION DISPUTES UNDER THE RAILWAY LABOR ACT

§ 1206.2 *Percentage of valid authorizations required to determine existence of a representation dispute.*

(a) Where the employees involved in a representation dispute are represented by an individual or labor organization, either local or national in scope and are covered by a valid existing contract between such representative and the carrier, a showing of proved authorizations (checked and verified as to date, signature, and employment status) from at least a majority of the craft or class must be made before the National Mediation Board will authorize an election or otherwise determine the representation desires of the employees under the provisions of section 2, Ninth, of the Railway Labor Act.

(b) Where the employees involved in a representation dispute are unrepresented, a showing of proved authorizations from at least thirty-five (35) percent of the employees in the craft or class must be made before the National Mediation Board will authorize an election or otherwise determine the representation desires of the employees under the provisions of section 2, Ninth, of the Railway Labor Act.

APPENDIX D

APPENDIX

AGREEMENT

between

TEXAS PACIFIC - MISSOURI PACIFIC TERMINAL RAILROAD OF NEW ORLEANS

and the

UNITED TRANSPORTATION UNION

Schedule of Pay Allowed and Rules Governing Switchmen

Reprinted

January 1, 1974

ARTICLE 18

Discipline and Grievances

(a) No employe covered by this agreement will be suspended, discharged, or unfavorable entries made against his record without just and sufficient cause, and not until he has had a fair and impartial investigation. Investigations will be held promptly, ordinarily within ten (10) days after the offense has been committed, to which a decision in writing will be rendered within ten (10) days after the investigation or the case will be considered closed. When brought to trial for any offense, the charge will be specified in writing, and the employe charged shall have the right to have another employe covered by this agreement, or a duly accredited representative of the UTU to assist at such investigation, and

to procure witnesses to testify in his defense, to examine all papers used in the investigation, and to question all persons giving evidence in his case. The employe charged and his representative will be furnished a copy of the transcript of the investigation on request. In case he is not satisfied with the result of said investigation, he shall have the right to appeal within ten (10) days, to his superior officer in person, or through his representative, as above specified. (T-32141)

(b) In case his suspension or dismissal is found to be unjust, he shall be reinstated and paid for all time lost. All complaints made by one employe against another, covered by this agreement, must be made in writing.

(c) If an employe is asked to sign a statement, the contents of same should be made entirely clear to him and a copy of such statement furnished to him, if desired.

(d) In the handling of grievances, including time claims, the chairman will inform the officer rendering decision within a reasonable time when a decision is accepted; in the event question in dispute has been handled with the officer having final authority, and his decision is not acceptable, the chairman will so notify him of this fact within a reasonable time.

APPENDIX E

ARTICLE 23

Representation and Rulings

(a) The right to negotiate and interpret schedule rules and agreements covering rates of pay and working conditions of employes covered by this agreement, is vested in the General Grievance Committee of the UTU and the Railroad.

(b) The right of employes covered by this agreement to have the regularly constituted committee of his organization represent him in the handling of his grievances under the recognized interpretation placed upon the agreement involved between the officials of the Railroad and the General Grievance Committee making same is conceded.

(c) Any rulings made with reference to any Article enumerated herein by the proper Official of the Railroad will be made in writing, and the Chairman of the General Grievance Committee, UTU, will be furnished a copy of said ruling, but said ruling shall not be made effective until agreed to between the parties herein mentioned.

(d) This agreement as rewritten is effective 1-1-74 and supersedes Yard Agreement effective 10-7-57 with the understanding that other written agreements and settlements on matters not covered by this rewritten agreement are not cancelled and that written agreements, rulings, settlements, and interpretations and decisions and awards of tribunals authorized to represent the parties hereto interpreting the rules of the agreement named herein are not superseded by this rewritten agreement.

This agreement shall remain in effect until and unless changed in accordance with the Railway Labor Act. Revised January 1, 1974.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 84-700
SECTION "H" MAG. DIV. NO. 2

W. G. TAYLOR, K. P. BROCKHOEFT, A. J. RUIZ, WAYNE A. SEPCICH and BROTHERHOOD OF LOCOMOTIVE ENGINEERS

v.

MISSOURI PACIFIC RAILROAD COMPANY and UNITED TRANSPORTATION UNION

AFFIDAVIT OF O. B. SAYERS

BEFORE ME, the duly undersigned authority, personally came and appeared O. B. Sayers, who, after first being sworn, states that the following facts are true and correct and within his personal knowledge:

(1) I am presently employed at the Missouri Pacific Railroad Company as Assistant Vice President, Labor Relations. In my position as Assistant Vice President, I am the highest officer at the Missouri Pacific Railroad Company (MoPac) designated to handle disputes arising under the various collective bargaining agreements between MoPac and the respective unions that have members working for MoPac.

(2) The Brotherhood of Locomotive Engineers (BLE) and the United Transportation Union (UTU) are two of the thirteen standard railroad unions which represent various MoPac employees working in the various crafts

or classes. Three other unions, which are not standard railroad unions, also represent some MoPac employees.

(3) Defendant UTU is the duly designated collective bargaining representative pursuant to the Railway Labor Act for employees of defendant MoPac working in the craft or class of conductors, trainmen, and switchmen.

MoPac and the UTU entered into a Collective Bargaining Agreement governing the rates of pay, rules, and working conditions for the craft or class of conductors, trainmen, yardmen, and switchmen, including seniority provisions, discipline and discipline investigation rules, and machinery for the resolution of disputes involving the interpretation and application of the Collective Bargaining Agreements relating to those individuals. A copy of the governing Collective Bargaining Agreement between MoPac and the UTU is attached as Exhibit "A" hereto.

(4) Plaintiff BLE is the duly designated collective bargaining representative under the Railway Labor Act for employees of defendant MoPac working in the craft or class of engineers. MoPac entered into a collective bargaining agreement with the BLE governing the rates of pay, rules, and working conditions for the craft of engineers; this collective bargaining agreement also controls seniority provisions, discipline and investigation rules, and machinery for the resolution of disputes involving the interpretation and application of the collective bargaining agreements related to those engineers. A copy of the applicable Collective Bargaining Agreement is attached hereto as Exhibit "B".

(5) The named individual plaintiffs are presently employed by the defendant Missouri Pacific at its Avondale,

Louisiana yard, and have seniority in the craft of switchmen.

(6) These named individual plaintiffs were originally hired as switchmen by the Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans, which was a wholly owned subsidiary of defendant MoPac. On December 31, 1977, the TP-MP was merged into the MoPac.

(7) Prior to August 1983, no switchmen working as such on the TP-MP or MoPac, including those who have the right to or had acquired engineer seniority, had sought to be represented by the BLE in the handling of claims or grievances on the property arising within the craft of switchmen.

(8) Plaintiff Taylor worked as a switchman from September 23, 1967 through March 23, 1980, and then worked as an engineman from March 24, 1980 to August 16, 1982. From August 1982 until the present time, Mr. Taylor has worked continuously as a switchman.

(9) While working as switchman, the rates of pay, rules, and working conditions are governed by the agreement between the UTU and MoPac. The agreements between the BLE and MoPac do not govern the rates of pay, rules, and working conditions of individuals working as switchmen. There are separate seniority rosters for switchmen and enginemen.

(10) While working as an engineman, the rates of pay, rules, and working conditions are governed by the agreement between plaintiff BLE and MoPac. The agreement between the UTU and MoPac does not govern the rates of pay, rules, and working conditions of the individuals who are working in engine service.

(11) Affiant further states that engineers working for Missouri Pacific are qualified on the mechanical rules and functions of locomotives, while switchmen are not. While working as switchmen, employees are prohibited from operating locomotives.

(12) On or about January 1, 1984, all of the individual plaintiffs were working as switchmen.

(13) In or about January 1984, MoPac convened a hearing to consider the charges filed against the plaintiffs Taylor, Ruiz, and Sepcich with respect to possible misconduct while working as switchmen. MoPac convened a company level investigation in accordance with the MoPac-UTU Collective Bargaining Agreement governing switchmen (Exhibit A).

(14) The individual plaintiffs sought to have BLE local chairman W. L. LaNassa as their representative at the company level investigation for possible misconduct while working as switchmen.

(15) MoPac advised the BLE that, based upon its interpretation of the Collective Bargaining Agreement between MoPac and the UTU, the BLE would not be allowed to represent the individual plaintiffs at the company level investigation. MoPac further advised the BLE that the collective bargaining agreement between MoPac and the UTU exclusively governs claims and grievances at the company level for employees while working as switchmen. MoPac, however, has not refused to allow the BLE to represent individual plaintiffs at levels beyond company level proceedings. Similarly, MoPac has not refused to allow the BLE to represent employees who are working as engineers at company level proceedings.

(16) MoPac's decision not to allow the BLE to represent switchmen at company level disciplinary proceedings is based upon MoPac's interpretation of Articles 18 and 23 involving discipline, grievances, and representation of switchmen. In addition, MoPac's position is supported by the fact that such grievance and disciplinary proceedings before the carrier have been handled in the same manner in the past, and, thus, this approach represents the usual manner for the handling of grievance and disciplinary matters.

(17) Affiant further notes that the Collective Bargaining Agreement between the BLE and MoPac similarly provides that only the BLE will represent engineers working for the Missouri Pacific in disciplinary and grievance proceedings on the property.

(18) MoPac believes that based upon its interpretation of the Collective Bargaining Agreement between MoPac and the UTU, it would be a flagrant violation of the UTU agreement to allow the BLE to represent switchmen at disciplinary and grievance proceedings at the company level. Likewise, it would be violative of the agreement between MoPac and the UTU to allow any of the other fourteen unions that have agreements with MoPac to represent switchmen in discipline or grievance matters while those individuals are working as switchmen for the Missouri Pacific.

(19) Affiant states that he has reviewed the Affidavit of D. F. Riley, who is the General Chairman of the General Committee of Adjustment, Brotherhood of Locomotive Engineers. A copy of Mr. Riley's Affidavit, which was submitted by the BLE in the case of *Peters v. National Railroad Passenger Corporation and BLE,* No.

83-3431 on the docket of the United States District Court for the District of Columbia, is attached hereto as Exhibit "1".

(20) MoPac agrees with Mr. Riley's sworn statements that the collective bargaining agreements between a carrier and a union, such as the collective bargaining agreement between MoPac and the UTU, require that the carrier cannot allow any other union to handle claims or grievances at the company level involving employees covered by the agreement relative to that specific craft.

(21) MoPac agrees with the statements of BLE Chairman Riley (Exhibit "1") that if a rival union is permitted to handle claims or grievances at the company level, the collective bargaining process would be undermined. Such a procedure likewise would impact on specific contractual provisions negotiated between the carrier and the respective union, without the signatory union's approval as a collective bargaining representative.

(22) There did not exist shuttling between crafts by the plaintiffs in this case. As indicated above, very few employees of the MoPac have even worked in more than one craft.

(23) The Missouri Pacific believes that it would be extremely disruptive to the business of the Missouri Pacific and would abrogate the substantive portions of contractual agreements between MoPac and the respective unions if a rival union could represent an employee in a company level grievance or disciplinary proceeding that arose from the employee's conduct in a craft not subject to the collective bargaining agreement of the rival union. More importantly, if the BLE is allowed to represent switchmen in disciplinary proceedings at the com-

pany level, the BLE would be involved with the interpretation of the UTU agreement whenever the BLE represented switchmen; such a result is illogical because the resolution of such proceedings frequently depends upon what the carrier and signatory union intended when they negotiated the collective bargaining agreement.

(24) Affiant believes that if the BLE is allowed to represent switchmen in grievance and disciplinary proceedings on the property, it would foster the pursuit of frivolous cases by BLE in its effort to enhance the BLE's appeal to individuals that are not represented by the BLE. Such an approach would lead to increased difficulty for MoPac and would prevent MoPac from ensuring that claims or disciplinary proceedings are handled on a consistent basis.

(25) The problems and administrative burdens that would develop if the BLE can represent switchmen at a company disciplinary proceeding would be aggravated at MoPac because the other fourteen unions at MoPac likewise may seek to represent switchmen and others, which would be extremely disruptive for the Railroad.

(26) Missouri Pacific believes that the representational or jurisdictional issues involved in this dispute should properly be considered by the National Mediation Board pursuant to the terms of the Railway Labor Act. BLE recently recognized the propriety of initially submitting representational or jurisdictional issues to the National Mediation Board, as evidenced by BLE's application asserting a representation dispute with respect to switchmen employed by Missouri Pacific; a copy of the NMB's ruling on the BLE's application is attached as Exhibit 2 to this affidavit. In summary, the representational and

jurisdictional disputes in this matter should be referred to the National Mediation Board, and any contract interpretation issues referred to the National Railroad Adjustment Board pursuant to Section 2 and Section 3, respectively, of the Railway Labor Act.

/s/ O. B. SAYERS
O. B. Sayers

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 3rd
DAY OF DECEMBER, 1984.

/s/ J. J. MARRA
Notary Public

My Commission expires July 18, 1988.

J. J. MARRA - NOTARY PUBLIC
State of Missouri, Commissioned
within the County of St. Louis

(2) (2)

Nos. 86-642 and 86-669

In the Supreme Court of the United States

October Term, 1986

UNITED TRANSPORTATION UNION,
Petitioner,

vs.

W. G. TAYLOR, *et al.*,
Respondents.

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

W. G. TAYLOR, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Do the federal courts have subject matter jurisdiction to determine whether a provision in a collective bargaining agreement prohibiting a railroad operating employee from selecting the union to which he belongs to represent him in processing his claims and grievances and to appear with him at investigative hearings is invalid under the Railway Labor Act, 45 U.S.C. §§151 *et seq.*?

2. Whether the Railway Labor Act renders unenforceable exclusive grievance representation provisions which prevent a member of a union that meets the standards of the union shop requirements under an agreement entered into pursuant to 45 U.S.C. §152, Eleventh (c), from selecting his union, rather than the collective bargaining representative of the craft in which he is working, to represent him at investigations and in handling his grievances?

PARTIES INVOLVED

Petitioners are Missouri Pacific Railroad Company and United Transportation Union, the defendants-appellants below. Respondents are W. G. Taylor, K. P. Brockhoeft, A. J. Ruiz, Wayne A. Sepcich and Brotherhood of Locomotive Engineers.

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ON PETITION FOR WRIT OF CERTIORARI TO THE
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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

Although the statements contained in the petitions of the Missouri Pacific Railroad Company ("MoPac") and United Transportation Union ("UTU") are essentially correct insofar as they draw from the opinions below, it needs

to be noted that MoPac has been in existence since 1917. *Moody's Transportation Manual,* p. 162 (1985). During that period, the petitioner UTU, and its predecessors prior to 1969, have been the collective bargaining representatives for the crafts of firemen (helpers), conductors, trainmen and switchmen.[1] Respondent Brotherhood of Locomotive Engineers ("BLE") has represented the craft of locomotive engineers. In fact, BLE is the collective bargaining representative for the craft of locomotive engineers on almost all of the nation's railroads and is a national railway labor organization which admits to membership employees in engine, train, yard and hostler service within the meaning of Section 2, Eleventh (c) of the Railway Labor Act ("RLA"), 45 U.S.C. §152, Eleventh (c).

As such, BLE is qualified to appoint two labor members on the First Division of the National Railroad Adjustment Board pursuant to Section 3, First of the RLA. UTU also opens its membership to employees in the crafts of engineers, firemen (including hostlers),[2] conductors,

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1. Railroad employees are organized on a craft basis. *See Switchmen's Union v. NMB,* 320 U.S. 297 (1943); 45 U.S.C. §152, Ninth. "Operating employees" are those employees involved in the movement of the locomotive units and their train consist, and comprise five crafts that are further called "engine service" employees (engineers and/or firemen) and "train service" employees (conductors, trainmen and switchmen).

2. On October 31, 1985, UTU entered into a national agreement with the National Railway Labor Conference, which is the negotiating arm of the nation's railroads, to eliminate the craft of firemen and eventually to replace them as the source of supply for engineers with train service employees. The preface of Article XIII of that agreement reads:

> "The craft or class of firemen (helpers) shall be eliminated through attrition except to the extent necessary to provide the source of supply for engineers and for designated passenger firemen, hostler and hostler helper positions. Trainmen shall become the source of supply for these positions as hereinafter provided."

(Continued on following page)

trainmen and switchmen. Therefore, it likewise is qualified to appoint the two other labor members on the First Division. The First Division has jurisdiction to hear and resolve all grievances and claims of railroad employees in the operating crafts—the crafts exclusively represented by BLE and UTU on the nation's railroads.

Moreover, membership in either BLE or UTU by an operating employee statutorily fulfills any union shop requirement negotiated by BLE or UTU as representative of any operating craft, even though the other union is not a craft representative on the employing rail carrier. *Birkholz v. Dirks,* 391 F.2d 289 (7th Cir. 1968); *O'Connell v. Erie Lackawanna R.R.,* 391 F.2d 156 (2d Cir. 1968). *See also,* 45 U.S.C. §152, Eleventh. As Section 2 of the UTU-MoPac Union Shop Agreement for the craft of switchmen provides, the requirements of membership in UTU, in the particular instance, shall be satisfied "if said employee should hold or acquire membership in any one of the labor organizations national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of a craft or class in any of said services." (Affidavit of M. L. Royal, ¶3, which is attached as Appendix A, A2-A3). And UTU agrees that trainmen and engineers satisfy their union shop agreements by belonging to either UTU or BLE (Exhibit C to Affidavit of W. J. Wanke, which is attached as Appendix B, A13-A15).

BLE has never objected to UTU representing its members in the processing of any claims arising under the BLE collective bargaining agreements on MoPac through

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Footnote continued—

Thus, if the UTU-MoPac reading of the RLA were accepted, it would have the absurd result of sanctioning UTU to represent all operating employees in the grievance-arbitration machinery, and limit BLE to its locomotive engineer members.

the grievance machinery specified in those contracts. And until this case, UTU had never objected to BLE representing its members in the processing of any claim arising under a UTU labor contract, notwithstanding the exclusive representation language therein.

W. G. Taylor and the three other individual respondents are employed by MoPac at its Avondale, Louisiana Yard. They are switchmen and also are locomotive engineers or hold promotion and work rights in that craft. As switchmen on MoPac they for years have had first preference to transfer into the engine service crafts and ultimately promotion into and seniority within the engineers' craft (See also fn. 2, *supra*). Thus, when Taylor and other switchmen working as engineers are unable to work in the latter craft, they flow back as firemen or switchmen until their seniority again permits them to work as engineers (Royal Affidavit, ¶2, Appendix A, A2). All of the individual respondents are members of BLE (*Id.* ¶6, App. A, A4).

Shortly after January 1, 1984, the respondents Taylor, Ruiz and Sepcich were charged with misconduct. They sought to have BLE's local chairman act as their representative at the investigative hearing scheduled for February 8, 1984, but MoPac refused to permit them to be represented by anyone other than an officer of UTU. The investigation was held without the employees having their requested representation (*Id.* ¶8, App. A, A4-A5).

On other occasions, other members of BLE, including the respondents sought BLE representation regarding their claims and grievances. In each instance, MoPac refused to allow BLE to handle its members' claims and to submit those matters for arbitration provided by public law boards

pursuant to Section 3, Second of the RLA, 45 U.S.C. §153, Second[3] (*Id.* ¶10, App. A, A5).

In support of its denial of each employee's request for BLE assistance, MoPac relied upon the provisions of its bargaining agreement with UTU, including Articles 18 and 23, which limit and restrict appearances at investigations and in the handling of claims and grievances to the "duly accredited representative of the UTU." (MoPac Pet. App. B at 22a-24a).

The complaint was filed on February 6, 1984, to enforce the rights of the employees to have their disciplinary cases and grievances handled by BLE as their selected representative and for BLE to handle their disciplinary matters and any other claims at arbitration before special boards of adjustment (sometimes called "Public Law Boards") created in accordance with Section 3, Second of the RLA, 45 U.S.C. §153, Second.

MoPac moved to dismiss for lack of subject matter jurisdiction, which was opposed by both UTU and the respondents. The motion was denied on August 22, 1984. Both petitioner UTU and respondents filed motions for summary judgment, and MoPac opposed both on the same jurisdictional grounds. However, on March 20, 1985, the district court granted summary judgment for the employees and BLE (MoPac Pet. App. B, 10a-26a).

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3. Section 3, Second, in pertinent part, provides that if "written request is made upon any individual carrier by the *representative of any craft or class of employees of such carrier* for the establishment of a special board of adjustment * * * the carrier or representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made." (Emphasis supplied). BLE meets the standard set out in the italicized language.

The district court rejected MoPac's jurisdictional objections, because the case did not present a dispute regarding the jurisdiction of competing unions as to which the National Mediation Board has exclusive jurisdiction under Section 2, Ninth of the RLA[4] in that "this case presents no issue about UTU's authority to make agreements with MOPAC relating to the working conditions, rules, and pay of MOPAC switchmen." (MoPac Pet. App. B at 13a). In addition, the trial court held that the matter did not involve a "minor dispute" regarding the interpretation or application of a collective bargaining agreement provision since "the parties agree that the challenged provisions of the UTU/MOPAC agreements purport to create an exclusive right of UTU to represent switchmen at all MoPac company level proceedings." (*Id.*)

In holding that it had jurisdiction, the district court said:

> "Since the issue is one of validity, not interpretation, it is for judicial consideration. *See Felter v. Southern Pacific Co.*, 359 U.S. 326, 327 n.3, 79 S. Ct. 847, 850 n.3 (1959); *Order of Railway Conductors & Brakemen v. Switchmen's Union of North America*, 269 F.2d 726 (5th Cir. 1959). Nothing in the RLA restricts the Court's jurisdiction to determine whether the exclusive representation provisions of the UTU/

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4. Section 2, Ninth, 45 U.S.C. §152, Ninth, authorizes the Mediation Board "to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier." In other words, this provision gives the NMB exclusive jurisdiction to investigate and certify the craft representative for purposes of negotiating rates of pay, rules, and working conditions.

MOPAC agreements are valid." (MoPac Pet. App. B, 13a-14a).

Following the lead case in this area, *McElroy v. Terminal R.R. Ass'n of St. Louis*, 392 F.2d 966 (7th Cir. 1968), *cert. denied*, 393 U.S. 813 (1969), the district court ruled as follows on the merits:

> "Reading the language of the Act 'not in a vacuum, but in the light of the policies [it] was intended to serve,' *Pennsylvania R.R. Co. v. Rychlik*, 352 U.S. 480, 488, 77 S. Ct. 421, 425 (1957), we conclude that under the Act the individual plaintiffs are entitled to designate their union, BLE, to represent them in company level proceedings notwithstanding the UTU/MOPAC agreements to the contrary. We hold that the Act renders null and unenforceable the exclusive representation provisions of the UTU/MOPAC agreements insofar as they prevent a member of a railway union from selecting his own union rather than the bargaining representative union of the craft in which he is working to assist him at company level proceedings." (*Id.*, at 15a).

Judgment was eventually entered for the employees on August 8, 1985, after the claim for damages was waived (MoPac Pet. App. A, 3a). On appeal, the United States Court of Appeals for the Fifth Circuit affirmed (MoPac Pet. App. A at 1a-9a).

Like the district court, the Fifth Circuit held that neither the Adjustment Board nor the NMB had jurisdiction, for "the pertinent contractual provisions, reprinted in 614 F. Supp. at 1325-26, are clear and unambiguous and require no interpretation," (MoPac Pet. App. A, 4a) and there was no dispute "to implicate UTU's bargaining

position" and, therefore, to create "a representation dispute within the NMB's exclusive jurisdiction." Rather the Court of Appeals said that the issue specifically was "[w]hether a provision of a collective bargaining agreement is valid," which is "classic grist for the judicial mill." (*Id.* at 5a).

After looking at the language of the RLA, its goals and pertinent congressional testimony and after noting its decision accords "with the holdings or leanings of our colleagues in the Seventh, Eighth, and Tenth Circuits," the Fifth Circuit affirmed and said:

> "The individual, in such an instance [particular disciplinary or grievance hearing], would have a vital interest; that individual is the employee 'interested in the dispute.' The individual should be permitted to select his or her representative. Only in that manner would the heralded right to free selection of union membership be accorded the status and dignity explicit and implicit in the relevant statutes." (MoPac Pet. App. A, 9a).

REASONS FOR DENYING THE WRIT

This case involves no question that is significant for review by this Court. Clearly, Section 2, Second, Third and Sixth and Section 3, First (j) of the RLA grant operating employees the right to choose the union in which they hold membership to act in their behalf in investigation hearings and in processing their claims and grievances. As held by the Seventh Circuit in *McElroy v. Terminal R.R. Ass'n of St. Louis*, 392 F.2d 966, 969 (7th Cir. 1968), *cert. denied*, 393 U.S. 813 (1969), the RLA "guarantees an individual employee the right to

prosecute his grievance through any representative he may designate."

The legislative history of the RLA shows that employees without question have always had the right to be represented in grievance matters by the union to which they belong. *See Hearings Before House Committee on Interstate and Foreign Commerce on the Railway Labor Act*, H.R. 7650 (73rd Cong., 2d Sess.) at 44,89. Moreover, this Court has held that an employee's claims or grievances are his own to be handled independently by him or through the representative of his choosing, and cannot be interfered with by the carrier and/or the bargaining representative for the craft. *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711 (1945), *aff'd on reh.*, 327 U.S. 661 (1946) ("*E.,J.& E.* case").

Following this Court's opinion in the *E.,J.& E.* case, then Attorney General Tom C. Clark entered an opinion that the RLA guarantees the right of the railroad employee to prosecute his grievance personally or through any representative he may designate, including a minority union. 40 *Op. Att'y Gen.* 494, at 495 (1946). *See also McElroy v. Terminal R.R. Ass'n of St. Louis, supra; General Committee v. Southern Pacific Co.*, 132 F.2d 194, 201 (9th Cir. 1942), *reversed on other grounds*, 320 U.S. 338 (1943); *Douds v. Local 1250, Retail, Wholesale & Department Store Union*, 173 F.2d 764 (2d Cir. 1949).

The doctrine of individual choice in grievance handling by railroad operating employees is further substantiated by Section 2, Eleventh (c) of the RLA, which permits all operating employees to satisfy the union shop requirements of any compulsory union membership agreement by membership in either BLE or UTU. *Pennsylvania R.R. v. Rychlik*, 352 U.S. 480 (1957); *O'Connell v.*

Erie Lackawanna R.R., 391 F.2d 156 (2d Cir. 1968); *Birkholz v. Dirks*, 391 F.2d 289 (7th Cir. 1968). In addition, the Eighth Circuit and the Tenth Circuit, in *United Transportation Union v. Burlington Northern, Inc.*, 563 F.2d 1279 (8th Cir. 1977) and *Brotherhood of Locomotive Engineers v. Denver & Rio Grande Western R.R.*, 411 F.2d 1115 (10th Cir. 1969), concluded that UTU, in those cases the minority union, could require the employing railroad to set up a Public Law Board to handle its members' grievances and discipline matters, even though the claims arose in a craft for which the UTU was not bargaining representative and the employees involved had no likelihood of ever working in a UTU represented craft.

Also, in respect to MoPac's assertion relative to jurisdiction, there is no significant issue which needs the attention of this Court. As a question of contract validity, the issue is solely one for judicial consideration, not arbitration by the National Railroad Adjustment Board or by a Public Law Board under Section 3 of the RLA. *See, e.g., Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768, 774 (1952); *Felter v. Southern Pacific Co.*, 359 U.S. 326 (1959). Nor does the dispute constitute "a representation dispute within the NMB's exclusive jurisdiction." (MoPac Pet. App. A, 5a). Not only does everyone concede that UTU is the bargaining representative for switchmen with authority to negotiate the labor contract for the switchmen craft as a whole so that nothing involved in this case can purport to be a jurisdictional or representational dispute, but the National Mediation Board has no adjudicating authority or the power to fashion relief in a case of this nature, nor has that Board been given the function of interpreting the RLA. *See Detroit & T. S. L. R.R. v. United Transportation Union*, 396 U.S. 142, 158-159 (1969).

Therefore, contrary to petitioners' assertions, the decision below is not in conflict with any decision of the other courts of appeals and presents no question under the RLA which merits this Court's review. Moreover, the decision is consistent with the holdings of this Court and the applicable provisions of the RLA and their legislative history.

I. THE RULING BELOW RELATIVE TO SUBJECT MATTER JURISDICTION WAS NOT ERRONEOUS AND DOES NOT PRESENT A SIGNIFICANT ISSUE.

It is well-settled that the statutory commands under the RLA are not mere exhortations but are enforceable in the courts. This doctrine was first announced in *Texas & N.O. R.R. v. Brotherhood of Ry. & S.S. Clerks,* 281 U.S. 548 (1929), which upheld the issuance of an injunction prohibiting a carrier from interfering with its employees' rights to organize and from promoting a company union. Later, in *Virginian Ry. v. System Fed. No. 40,* 300 U.S. 515 (1937), the Court detailed the powers of the federal courts to fashion equitable relief to enforce the RLA's statutory commands in upholding the issuance of relief against a carrier that refused to bargain with the certified craft representative and had attempted to defeat its majority status. In accordance with those decisions, respondents requested enforcement of rights under Sections 2 and 3 of the RLA, and the Courts below fashioned equitable relief enforcing those commands.

Further, the question of the legality of the UTU-MoPac exclusive representation provision was properly for the courts to decide and is not one for Adjustment Board consideration. This Court has decided that contract validity questions are for the courts and not for the Adjustment

Board. *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768, 774 (1952); *Felter v. Southern Pacific Co.*, 359 U.S. 326, at 327 n.3 (1959). *See also Order of Ry. Conductors & Brakemen v. Switchmen's Union*, 269 F.2d 726 at 729 (5th Cir. 1959) ("the case poses a genuine issue as to validity, not interpretation, so that on these and other authorities, it is one for judicial consideration.") Also, where the Adjustment Board cannot provide the relief sought, as here, the Court has decided that the need for judicial intervention is itself sufficient to confer jurisdiction on the courts, even if contract interpretation questions were involved, which we do not suggest remotely exists in this case. *See Glover v. St. Louis - S.F. R.R.*, 393 U.S. 324, 329 (1969).

Finally, the courts below correctly rejected the contention of MoPac that the dispute is a jurisdictional one within the jurisdiction of the NMB. As a reading of Section 2, Ninth of the RLA, 45 U.S.C. §152, Ninth, reveals, the NMB has jurisdiction only to determine through an election the certified representative of a craft or class of employees. That section of the Act and the NMB have nothing whatsoever to do with the selection of the individual's grievor or his choice of the person or the union that he wishes to represent him in the grievance-arbitration procedures. Respondents throughout the proceeding have conceded that UTU is the bargaining representative for the craft of switchmen on MoPac. They also concede that neither they nor the grievance handler chosen by them can negotiate the rates of pay, rules, or working conditions for the switchmen craft as a whole, and they are not seeking to infringe upon UTU's authority in that respect. There is simply nothing involved in this case that can be perceived to be a jurisdictional or representational dispute. Accordingly, the principle that the NMB has ex-

clusive jurisdiction to resolve representational disputes, which the Court enunciated in the 1943 Trilogy of *Switchmen's Union v. NMB*, 320 U.S. 297; *General Committee v. Missouri-Kansas-Texas R.R.*, 320 U.S. 323; and *General Committee v. Southern Pacific Co.*, 320 U.S. 338, is inapplicable. Simply put, as this Court said in *Detroit & T.S. R.R. v. United Transportation Union*, 396 U.S. 142, at 158 (1969), "the Mediation Board has no adjudicating authority. . .," nor could it grant any relief in this situation.

II. THE DECISION BELOW CONFORMS WITH THE APPLICABLE STATUTORY LANGUAGE AND ITS LEGISLATIVE HISTORY

A. The RLA Provides That An Employee May Select His Own Representative For Handling His Claims.

The RLA provision applicable to company-level proceedings is Section 2, Second of the RLA, 45 U.S.C. §152, Second, which provides that claims and grievances shall be considered "in conference between *representatives designated* and authorized so to confer, respectively, by the carrier or carriers and *by the employees thereof interested in the dispute.*" (Emphasis supplied). As stated by the Seventh Circuit in *McElroy v. Terminal R.R. Ass'n of St. Louis*, 392 F.2d 966, at 969 (7th Cir. 1968), *cert. denied*, 393 U.S. 813 (1969), "on its face, this provision guarantees an individual employee the right to prosecute his grievance through any representative he may designate."

If this were not sufficient to establish the point, Section 2, Third, 45 U.S.C. §152, Third, permits employees to designate representatives without interference from the carrier, and establishes that the representatives of

those employees need not be employees of the carrier. Section 2, Sixth, 45 U.S.C. §152, Sixth, permits individual employees or their fellow employee representatives to confer with management during working hours and without loss of pay. And in Section 3, First (j), Congress acknowledged the employee's right to choose any representative to act in his behalf in presenting "minor disputes," *i.e.*, disputes which concern grievances and contract interpretation questions before the National Railroad Adjustment Board or Public Law Boards.

Petitioners attempt to read the provisions of the RLA to grant the recognized or designated bargaining representative exclusivity in all matters, whether "major" or "minor." However, if one reads Sections 2 and 3 completely, the draftsmen of the RLA knew when and how to refer to the representative of the craft determined by the majority. That terminology is used only in Section 2, Fourth in reference to collective bargaining and in Section 2, Ninth relative to the representation elections held by the NMB to determine the bargaining representative for the craft. In all provisions having reference to individual rights or the handling of minor disputes, the RLA refers to "representatives designated by the employees interested in the dispute."

Relying upon the purposes of the RLA, particularly the freedom of association specified in 45 U.S.C. §151a, the Court of Appeals appropriately concluded:

> "The district court's decision manifestly is consistent with the stated goals of the RLA. Only specific language of the RLA would warrant rejecting the trial court's findings and conclusion. We have been cited to no such language, and find none" (MoPac Pet. App. A, 8a).

B. The Legislative History Of The RLA Shows That Employees Have Always Had The Right To Be Represented By Minority Unions In Grievance Matters.

In the hearings on the RLA before the House Committee on Interstate and Foreign Commerce, Commissioner Joseph B. Eastman, who had control of the nation's railroads for the federal government, was asked whether an individual or a group of individuals, not belonging to the craft representative, could present their grievances directly to the management. He responded:

> "[T]he old Railroad Labor Board . . . covered that point in the following language. I take this from the opinion of the Supreme Court in *Pennsylvania Federation v. Pennsylvania Railroad Company* (267 U.S. 203), in which this rule laid down by the board is quoted:
>
> 'The majority of any craft or class shall have the right to determine which organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all members of such craft or class. *No such agreement shall infringe, however, upon the right of employees not members of the organizations representing the majority to present grievances either in person or by representatives of their own choice.*'" *Hearings Before House Committee on Interstate and Foreign Commerce on the Railway Labor Act* (73rd Cong., 2d. Sess.), pp. 44. (Emphasis supplied).

In contravention of the exclusivity argument raised by petitioners, Commissioner Eastman stated:

> ". . . When it comes to collective bargaining in the matter of wages and working conditions, it seems to me plain that a company ought not be compelled to deal with more than one organization. It ought not to have to make bargains with two or three different organizations. *But when it comes to the presentation of grievances, that is a different matter, and certainly an individual employee ought not be stopped in any way from taking his grievance up directly with management, and I think that ought to apply to any other group of employees.*" *Id.* (Emphasis supplied).

George Harrison, Chairman of the Railway Labor Executives' Association and President of the Brotherhood of Railway Clerks, also testified that the majority representation features of the RLA were not intended to, and did not prevent individuals involved in grievances "from having representatives to handle their grievances that are not representatives of the majority." *Id.*, 89. In the same vein, he stated that the language contained in Section 3, First (j) applies to "the balance of the act in connection with grievances . . . just as it reads, where the individual may in person or by counsel of his own choosing of [sic] other representative, prosecute his grievances." *Id.*

In sum, the authors of the RLA intended that individual employees, like the individual respondents, would be able to use a minority union to process their grievances, and the language of the Act expresses that intent.

III. THERE IS NO CONFLICT WITH THE HOLDINGS OF THIS COURT OR THE DECISIONS OF THE OTHER CIRCUITS

In *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711 (1945), *aff'd on reh.*, 327 U.S. 661 (1946), the Court determined

that individual employees have the right to present their grievances to the National Railroad Adjustment Board and that the craft representative could not settle or withdraw them without the employee's consent. Finding the employee's grievances and claims are his own, the Court therefore held that "the individual employee's rights cannot be nullified merely by agreement between the carrier and the union." The Court said that these "are statutory rights which [the employee] may exercise independently or authorize the union to exercise in his behalf." 325 U.S. at 740 n.39.

On September 20, 1946, then Attorney General Tom C. Clark advised the President, in response to an inquiry from the National Mediation Board, that the *E.,J.& E.* case stressed that the RLA "obviously contemplates that an employee may personally present his own grievance to the management" and, thereby, the RLA "guarantees to the individual employee the right to prosecute his grievance personally or through any representative he may designate." 40 *Op. Att'y Gen.* 494, at 495 (1946). Justice Clark in summarizing his conclusions, said:

> "The agreement, however, under the decision of the Supreme Court in the *Elgin* case, cannot legally preclude an aggrieved employee from also negotiating with the carrier, personally or through an individually chosen representative, for the settlement of his grievance. *He may designate as his representative the union holding the contract or any other union or person otherwise qualified to act. He may negotiate, personally or by representative, whether or not the collective representative determines to pursue this matter.* And the settlement of the grievance, to be binding on the individual employees, must have been

authorized by him." (*Id.*, 499-500). (Emphasis supplied).

The various courts of appeals have uniformly ruled that a railroad employee can choose his own representative for processing his claims and grievances. In so ruling, the Ninth Circuit, rejecting the argument that only the bargaining representative for the craft could handle claims or grievances arising out of the collective bargaining agreement for that craft, said in response to a like argument of petitioner UTU that "[i]t is only with reference to craft organization and collective bargaining, that is, craft action, that a union chosen as a representative must be chosen by the majority." *General Committee v. Southern Pacific Co.*, 132 F.2d 194, 199 (9th Cir. 1942), *reversed on other grounds*, 320 U.S. 338 (1943). Based upon similar reasoning, the Fifth Circuit concluded in *Estes v. Union Terminal Co.*, 89 F.2d 768 (5th Cir. 1937), that the federal courts have jurisdiction to insure that a railroad employee receives notice of an arbitration proceeding, the award of which may affect his employment status, in order to permit the employee to choose his own representative in prosecuting his interests. More recently, the Sixth Circuit reached a similar result in *Meeks v. Illinois Central Gulf R.R.*, 738 F.2d 751 (6th Cir. 1984).

Any doubt about the issue in the railroad industry would seem to have been fully answered by the decision of the Seventh Circuit in *McElroy v. Terminal R.R. Ass'n of St. Louis*, 392 F.2d 966 (7th Cir. 1968), *cert. denied*, 393 U.S. 813 (1969). In that case, one of UTU's predecessors found the shoe to be on the other foot. BLE had made an explicit agreement with the railroad that it alone would be the union representative in contract enforcement under the BLE contract for engineers. As

here, the railroad refused to allow UTU's predecessor to handle grievances of engineer employees in enforcement of the engineers' contract, and to appear for those persons at investigative hearings. The Seventh Circuit struck down the exclusive representation provisions contained in the BLE agreement as being in violation of the rights afforded the individual employees under Sections 2 and 3 of the RLA.

The Seventh Circuit rejected its decision in *Broady v. Illinois Central R.R.*, 191 F.2d 73 (7th Cir. 1951) and the decision of the Eighth Circuit in *Butler v. Thompson*, 192 F.2d 831 (8th Cir. 1951), along with several others. Petitioners suggest that the named decisions establish a conflict with the Seventh Circuit's decision in *McElroy*. However, the Seventh Circuit appropriately found those cases to be inapposite or not applicable to operating employees. Factually, those cases did not involve employees who have promotion and work rights in multiple crafts, employees who may satisfy their union shop requirements by membership in a "minority" union, unions covered by Section 2, Eleventh (c) of the RLA, and unions qualified to represent employees in any craft or class of employees subject to the jurisdiction of the First Division of the National Railroad Adjustment Board. Rather those cases involved employees outside the coverage of Section 2, Eleventh (c) who did not belong to the "recognized unions," and who, in most instances, were seeking to set aside unfavorable grievance-arbitration decisions, after entry thereof, by challenging the procedures through which they were reached. In addition, in *Broady v. Illinois Central R.R., supra*, the Seventh Circuit was never apprised of the passage of Section 2, Eleventh of the RLA or of the effect of this Court's decision in the *E.,J.& E.* case.

Petitioners also attempt to portray a conflict in the lower courts on this issue by comparing *Coar v. Metro-North Commuter R.R.*, 618 F. Supp. 380 (S.D. N.Y. 1985), which held that railroad employees have a choice of representation at company-level proceedings, with *Landers v. Nat'l Railroad Passenger Corp.*, ... F. Supp. ..... (D. Mass. 1986). (See UTU Pet. App. D.) The district court in *Coar* ruled in the same manner that the trial court in this case did and basically adopted the opinion of the district court below with additional emphasis upon quotations from the legislative history of the 1934 RLA in which the draftsmen testified that the grievants may have "representatives to handle their grievances that are not representatives of the majority." *Coar v. Metro-North Commuter R.R., supra,* 618 F. Supp. at 383. The district court in *Landers,* however, had before it a much different case from that at bar. And the court relied upon the severe factual distinctions in concluding that "plaintiff cannot prevail on his argument that he has a right to be represented by his own union because that is the usual manner in which disputes have been resolved by Amtrak and its passenger engineers." (UTU Pet. App. D, 4-b). In *Landers,* the court relied upon the facts that Amtrak is a relatively new passenger carrier; that it did not begin employing passenger engineers until January 6, 1983; that the exclusive representation rule has been in effect from the start-up date; that the practice under that agreement "has consistently been to allow only the collective bargaining agent to act as an employee's representative;" that "representation by an employee's own union is not the usual manner of dispute resolution between Amtrak and its passenger engineers;" and that any shuttling between crafts by Amtrak locomotive engineers is "not shuttl[ing] between two crafts represented by two

different unions but between two crafts represented by the same union." (UTU Pet. App. D, 4-1).

Petitioners also rely upon the Fifth Circuit's decision in *Hughes Tool Co. v. NLB*, 147 F.2d 69 (5th Cir. 1945), the philosophy of the NLRB, and the expressions of several legal commentators as to the application of the National Labor Relations Act, 29 U.S.C. §§141 *et seq.* None of those references dealt with a reading of the RLA. This Court has frequently emphasized that parallels between the two Acts are precarious at best and, in most instances, are not appropriate. *Chicago & N. W. R.R. v. United Transportation Union*, 402 U.S. 570, at 579 n.11 (1971).

The Court in *Hughes Tool* did, in fact, find that the NLRB correctly held that grievance handling is not collective bargaining for the whole unit, which is restricted to the collective bargaining agent. 147 F.2d *supra*, at 72. The Fifth Circuit also held that individuals and groups of employees could fully prosecute their grievances through all stages and appeals. However, it refused to extend the employee's choice to a rival union, because in its judgment, Section 9(a) of the NLRA, 29 U.S.C. §159(a), did not intend that a rival union would be able to present grievances. The basis for this view was the fact that when the proviso was before Congress, a proposal to add the words "through repesentatives of their own choosing" was rejected. *But see Douds v. Local 1250, Retail, Wholesale & Department Store Union*, 173 F.2d 764 (2d Cir. 1949). The differing legislative history and language of the RLA, however, allow employees to designate a minority union to represent them in grievance and claims handling.

The union membership choice cases under the RLA further establish the consistency of the decisions below

with the general principles applicable to railroad operating employees. What point would there be in the broad protection for BLE membership provided by Section 2, Eleventh (c), if the most critical benefit of membership, grievance representation, can be wiped out by agreements between UTU and MoPac? Surely the membership protection of Section 2, Eleventh (c) must be a meaningful one, not subject to obliteration by removal of the rights of membership, rights long accepted in the industry and known to Congress when Section 2, Eleventh (c) was enacted in 1951. The history of this legislation and the membership protections therein are well chronicled in several cases. *Pennsylvania R.R. v. Rychlik*, 352 U.S. 480 (1957); *O'Connell v. Erie Lackawanna R.R.*, 391 F.2d 156 (2d Cir. 1968).

And Section 3, Second of the RLA, 45 U.S.C. §153, Second, which sets forth the Public Law Board arbitration procedures provided for by the 1966 amendments to the RLA, has also been read to permit a minority union (UTU in both cases) to handle contract grievances for its members employed in a craft represented by BLE. In ruling that the minority union could take its members' grievances to a public law board, the Eighth Circuit has stated:

> "In disputes arising out of collective bargaining agreements, other than merger protective agreements, an employee not only has a right to be represented by the union of his choice, but also has a right to have his union representative sit on the arbitration panel deciding the case. The employee has the right, even though the contract being construed was negotiated by a rival union and even though precedents established by the rival union and the railroad are to be followed." *United Transportation Union v. Burlington Northern, Inc.*, 563 F.2d 1279, at 1284 (8th Cir. 1977).

A similar conclusion was reached by the Tenth Circuit in *Brotherhood of Locomotive Engineers v. Denver & Rio Grande Western R.R.*, 411 F.2d 1115 (10th Cir. 1969).

Simply put, the decision below conforms with the well-established precedent on this issue, and there is no basis under the RLA for petitioners' expressions.

IV. THE PETITION DOES NOT RAISE ANY IMPORTANT QUESTION THAT NEEDS TO BE ADDRESSED BY THE COURT

Petitioners' final claim is that the decision below "frustrates industrial self-government and labor harmony," "will result in labor chaos," and "eviscerate the collective bargaining process in the railroad industry." (MoPac Pet. 16). This claim is based on an erroneous view of what the Court of Appeals decided in this case. For example, the Fifth Circuit clearly stated:

> "The right to associate freely with a national union of an employee's own choosing, and the effects of the exercise of that right, however, are not unlimited. In the instant case, for example, the BLE switchmen are not entitled to have BLE negotiate a separate collective bargaining agreement for them; rather, the terms and conditions of their employment necessarily are governed by the MOPAC-UTU agreement covering switchmen. *See, e.g., Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944). On the other hand, given the apparent importance Congress attached to freedom of choice, that right should be limited only when compelled by express language of the RLA. We find neither statutory language mandating such a result nor compelling reason to limit the right of free choice in the instant case." (MoPac Pet. App., 7a).

In anticipation of petitioners' argument, the Fifth Circuit concluded: "We further note that our holding today creates no conflict between the RLA policy of freedom of union choice for the employee and the stated goals of company-level settlement of disputes, 45 U.S.C. §152 First, and the transcending desire for labor-management stability." (MoPac Pet. App., 9a). Thus, the holding of the Court of Appeals does not negate the collective bargaining process or frustrate industrial self-government. The majority representative negotiates the agreement and its interpretation is placed upon that agreement in the grievance-arbitration process.

Moreover, the scheme of membership choice and representation in the railroad operating crafts is a fine tuned one that has served well for over fifty years. Throughout those years, the lack of exclusivity in the operating crafts has not led to chaos or lack of uniformity in application of agreements. MoPac has lived with that system, so it is difficult to understand its qualms at this point in time. For over 35 years, operating employees have belonged to any union, national in scope, and admitting those persons into its membership that choose to join. Yet no one has claimed that this fostering of minority unions has eviscerated the collective bargaining process in the railroad industry. The fathers of the RLA incorporated the procedures prevailing in 1934 to permit any union to represent an employee at all stages of the grievance-arbitration process. These procedures continued through 1966, and were reaffirmed by Congress in the amendments to Section 3, Second. None of the dire events predicted by petitioners has ever arisen.

Accordingly, the determination raises no issue involving federal railway labor policy which warrants review by this Court.

CONCLUSION

For the foregoing reasons the petitions should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Affidavit of M. L. Royal

Civil Action No. 84-700

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
Section "H"
Magistrate Division 2

W. G. TAYLOR, K. P. BROCKHOEFT, A. J. RUIZ, WAYNE A. SEPCICH and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiffs,

vs.

MISSOURI PACIFIC RAILROAD COMPANY and UNITED TRANSPORTATION UNION,
Defendants.

AFFIDAVIT OF M. L. ROYAL

STATE OF TEXAS)
) SS:
COUNTY OF BOWIE)

M. L. ROYAL, being first duly sworn, deposes and says:

(1) I am, and have been since 1971, General Chairman of the General Committee of Adjustment, Brotherhood of Locomotive Engineers, on the Missouri Pacific Railroad Company-Former Texas & Pacific (hereinafter "MoPac"), Texas Pacific-Missouri Pacific Terminal Rail-

road and Fort Worth & Denver Railway. The offices of the General Committee are located at Room 112 Cervini Building, 1001 Texas Boulevard, Texarkana, Texas 75501. This affidavit is made in support of the motion for summary judgment submitted by W. G. Taylor, K. P. Brockhoeft, A. J. Ruiz, Wayne A. Sepcich and the Brotherhood of Locomotive Engineers (hereinafter "BLE"), plaintiffs herein.

(2) W. G. Taylor, K. P. Brockhoeft, A. J. Ruiz and Wayne A. Sepcich are citizens of Louisiana and the United States and reside within the judicial district for the Eastern District of Louisiana. They are employed by MoPac at its Avondale, Louisiana Yard, and have seniority in the craft of switchmen, which are sometimes referred to as "yardmen". These individuals also have first preference to transfer into the craft of locomotive firemen at MoPac's Avondale Yard from which they will be eligible for promotion into the craft of locomotive engineers. Taylor has qualified and does hold seniority as a locomotive engineer for MoPac. When business conditions are such that Taylor and other switchmen who have acquired seniority as locomotive engineers are not able to hold positions as locomotive engineers or firemen, they flow back into the craft of switchmen and work as switchmen until they can again hold a position in the craft of locomotive firemen or the craft of locomotive engineers.

(3) BLE is a labor organization and an unincorporated association with its principal offices located at 1110 Engineers Building, Cleveland, Ohio 44114. BLE represents in collective bargaining numerous employees of various "carriers", within the meaning of Section 1, first of the Railway Labor Act, 45 U.S.C. Section 151, First, and

employees of MoPac. BLE is a "representative" of "employees" within the meaning of Section 1 of the Railway Labor Act, 45 U.S.C. Section 151. Since well into the nineteenth century and up until the present, the collective bargaining representative on most of the nation's railroads, with few exceptions, has been BLE. BLE also is the collective bargaining representative for the craft of firemen on some railroads, such as the Louisville and Nashville, Long Island and Grand Trunk Western. BLE is further an organization, national in scope, and admits to membership employees in engine, train, yard and hostling service, within the meaning of Section 2, Eleventh (c) of the Railway Labor Act, 45 U.S.C. Section 152, Eleventh (c). Said membership is offered pursuant to Section 26 Statutes, Constitution and Bylaws of the International BLE, which states: "membership may also be extended to other groups of employees, when in the opinion of the International President, or Executive Committee, such action would be advantageous to the Brotherhood of Locomotive Engineers." Membership in the BLE satisfies the union shop membership requirements contained in UTU agreements. Also, BLE is qualified to appoint two labor members of the First Division of the National Railroad Adjustment Board pursuant to Section 3, First (h) of the Railway Labor Act, 45 U.S.C. Section 153, First (h). The First Division has jurisdiction over disputes involving engineers, firemen, hostlers, conductors, trainmen and switchmen.

(4) MoPac is a corporation organized and existing under and by virtue of the laws of Delaware. It is a common carrier by rail engaged in interstate operations and subject to the provisions of the Interstate Commerce Act, 49 U.S.C. Section 1, *et seq.* MoPac is subject to

federal law relating to collective bargaining, employee disputes, and employee representation matters as set forth in the Railway Labor Act. MoPac operates a line of railroad and is doing business within the judicial district for the Eastern District of Louisiana.

(5) United Transportation Union (hereinafter "UTU") is a railroad labor organization, national in scope, and organized in accordance with the provisions of the Railway Labor Act, 45 U.S.C. Section 151, *et seq.*, with its headquarters and principal offices located in Lakewood, Ohio. UTU is the duly designated collective bargaining representative pursuant to the Railway Labor Act for the crafts of switchmen and firemen employed on the MoPac. It also is the craft representative for conductors and brakemen on MoPac. UTU admits to membership and collects dues from employees working for MoPac and other carriers in Louisiana and is doing business within the judicial district for the Eastern District of Louisiana.

(6) Each of the individuals named in paragraph 2 of this affidavit has been at all time material hereto a member of BLE; some of the individuals have from time to time been members of UTU.

(7) While working as an engineer, the rates of pay, rules and working conditions for Taylor and other switchmen who have been promoted to locomotive engineers are set by agreement between BLE and MoPac. While working as switchmen, the rates of pay, rules and working conditions for those individuals are set by agreement between UTU and MoPac. On or about January 1, 1984. Taylor was furloughed as an engineer and fireman and. along with Ruiz and Sepcich, was working as a switchman.

(8) On January 13, 1984, BLE Local Chairman W. L. Lanassa sought to represent switchmen at a time claim

conference with MoPac (Exhibit 1). By letter dated January 13, 1984, K. L. Cargile, MoPac Assistant Superintendent refused the request citing Article 23 of the UTU-MoPac agreement. (Exhibit 2). The position taken by Mr. Cargile was consistent with the position taken by O. B. Sayers, MoPac Assistant Vice President, Labor Relations, in a letter dated December 30, 1983 to BLE Vice President E. E. Watson. (Exhibit 3).

(9) In or about January, 1984, Taylor, Ruiz and Sepcich were charged with possible misconduct as switchmen under the UTU-MoPac collective bargaining agreement covering switchmen and called for an investigation by MoPac. These individuals sought to have BLE Local Chairman W. L. Lanassa as their representative at the investigation. BLE Local Chairman Lanassa was advised by MoPac that neither he, nor any BLE representative, would be permitted to represent Taylor or anyone else at the investigation scheduled for February 8, 1984. (Exhibit 4). On February 8, 1984, I attended the investigation and attempted to represent Taylor, Ruiz and Sepcich and was denied the right to represent these individuals by MoPac as seen by the transcript of the proceedings. (Exhibit 5). MoPac relied on Article 18 of the UTU-MoPac agreement at this hearing and refused to permit the individuals any representatives but one from the UTU.

(10) On other occasions, in 1983 and 1984, certain of the switchmen employed by MoPac, and members of BLE, including K. P. Brockhoeft, have sought BLE representation regarding claims and grievances, and MoPac, in such cases, has refused to treat with the BLE as such representative in regard to such claims or grievances, and further in regard to their appeal or arbitration. By letter dated August 10, 1983, I took issue with the decision made by MoPac. (Exhibit 6).

(11) On or about January 1, 1974, MoPac and UTU entered into an agreement establishing terms and conditions of employment for switchmen employed by MoPac. (Exhibit "A" attached to the complaint). Among the provisions of such contract are Articles 18 and 23 dealing with discipline and grievances and representation and rulings, respectively. In addition, Section 17 of an agreement dated August 11, 1948 provides for a time limit on claims. All said rules limit and restrict representation of switchmen in handling such to the defined "duly accredited representative", which is specified to be only a UTU representative and has been so enforced by MoPac. Moreover, Section 17 provides that "all claims or grievances involved in a decision of the highest officer shall be barred unless within six months from the date of said officers' decision proceedings are instituted by the employee or his duly authorized representative before a tribunal having jurisdiction pursuant to law." MoPac supports, in part, its refusal to treat with the BLE as representative of switchmen, such as Taylor and Brockhoeft, upon said Articles 18 and 23 of the January 1, 1974 MoPac-UTU agreement and Section 17 of a MoPac-UTU agreement dated August 11, 1948.

M. L. ROYAL

Sworn to and subscribed before me this ..... day of ....., 1984.

.....

Notary Public

APPENDIX B

Affidavit of W. J. Wanke

Civil Action No. 84-700

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
Section "H"
Magistrate Division 2

W. G. TAYLOR, K. P. BROCKHOEFT, A. J. RUIZ, WAYNE A. SEPCICH and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiffs,

vs.

MISSOURI PACIFIC RAILROAD COMPANY and UNITED TRANSPORTATION UNION,
Defendants.

AFFIDAVIT OF W. J. WANKE

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

W. J. WANKE, being first duly sworn, deposes and states as follows:

1. I am First Vice President of the International Brotherhood of Locomotive Engineers ("BLE") with offices at 1365 Ontario Street, Cleveland, Ohio. In 1964, I became Director of the Research and Schedule Department of BLE, subsequently became an International Vice

President in 1969 and was elected First Vice President in June 1980. As First Vice President, I have access to the records of BLE with respect to collective bargaining agreements and representation rights.

2. Since its formation, BLE has admitted to membership engineers and firemen, which were the basic source of engineers. As early as the 1940s, BLE took into membership and represented trainmen who had been promoted into the craft of engineers on railroads that followed that line of progression like the Pacific Electric and Sacramento Northern. In 1962, BLE amended its constitution to permit any employee eligible for promotion to engineer to become a member of BLE. By 1966, the nation's railroads were beginning to seek persons for training to become engineers from sources other than firemen, such as apprentice engineers. As time went on, most of the nation's railroads found that the period for training could be reduced if the persons training for locomotive engineers, such as apprentice engineers, came from the ranks of the train service crafts (conductors, trainmen and switchmen). After becoming apprentice engineers, firemen or engineers, many of these individuals, including train service employees, became members of BLE.

As their ranks increased, a number of these engineers with rights to jobs in the train service crafts were furloughed as engineers and returned to service in their former jobs. They, however, retained their membership in BLE, and BLE represented them in their personal grievances.

3. On July 19, 1972, UTU and the National Railway Labor Conference entered into two agreements providing

for certain manning requirements for firemen and for engineer training programs for the craft of firemen. As previously indicated, the railroads were obtaining many, if not most, of their firemen from the ranks of train service employees.

4. On August 25, 1978, UTU entered into a national agreement with the National Carriers' Conference Committee of which Missouri Pacific is a member railroad. Article VIII of this agreement codified and expanded upon the carriers' practice of employing employees represented by UTU in the train service crafts as firemen, a craft also represented by UTU. In sum, Article VIII, which is attached hereto as Exhibit "A", provides for preferential transfer rights for UTU-represented train service employees into the craft of firemen and, thus, promotion rights into the craft of locomotive engineers.

5. As a result of Article VIII of the August 25, 1978 Agreement, all conductors, trainmen and switchmen are eligible for membership in BLE, since they have promotion rights to engineer and may work in the engine service crafts and from time to time in the train service crafts when work is not available for them as firemen or engineers.

6. On January 8, 1981, Mr. Fred A. Hardin, President of UTU, was asked if an engineer upon returning to service as a brakeman could satisfy the requirements of UTU's union shop agreement by paying dues to BLE. (Exhibit "B"). In a letter dated January 19, 1981, UTU President Hardin said that trainmen-engineers could satisfy the union shop agreements by belonging to either union, UTU as the craft representative for trainmen and BLE as the craft representative for engineers and, there-

fore, a permissible alternate organization. Mr. Hardin's letter is appended hereto as Exhibit "C". In fact, even if BLE were not a craft representative on MoPac, a switchman's membership therein would satisfy the statutory alternate membership provision.

7. On January 1, 1983, the National Railroad Passenger Corporation (Amtrak) began operations of passenger service in the Northeast Corridor of the United States with its own equipment and own operating crews. BLE is the collective bargaining representative for the craft of locomotive engineers. UTU is the representative for conductors and for engine attendants, a new craft or class of employees that did not previously exist. In other words, there was a new carrier with a new craft. On Amtrak, there is no connection whatsoever between the engineers, engine attendants or conductors. The agreement entered into by BLE for Amtrak engineers permits engineers to be represented only by BLE in grievances and disciplinary matters. UTU has similar agreement provisions for the crafts represented by it. On November 14, 1983, UTU and one of its members, John Peters, an Amtrak engineer, brought suit to require Amtrak to allow UTU to represent Peters in grievance handling. The complaint in this case is patterned after the complaint in *John D. Peters, et al. v. National Railroad Passenger Corp., et al.*, Case No. 83-3431, in the United States District Court for the District of Columbia, a copy of which is attached hereto as Exhibit "D".

8. The Amtrak or Peters case involved a first time contract on a new carrier so that there was no historical practice of claim handling. UTU, however, has attempted to take the same position in that case which it tries to make here.

9. The practices referred to in UTU Nelson's affidavit are not significantly different today than they were in 1968 or in 1945 or in 1934, prior to the passage of the Railway Labor Act. Other than name changes and a flow of employees throughout the operating crafts, rather than within the engine service crafts and the train service crafts, operating employees hold seniority in the various crafts, have promotion and transfer rights between UTU and BLE crafts, are organized in crafts represented by the two unions, and can belong to BLE in satisfaction of the union shop agreement covering them when working as switchmen.

10. Contrary to the inference in UTU Nelson's affidavit, the usual manner of handling grievances has nothing to do with union representation of those grievances but to the grievance steps or stages prior to submitting the claim or grievance to arbitration before the First Division of the National Railroad Adjustment Board as provided in Section 3, First of the Railway Labor Act. Section 3, First (i) of the Railway Labor Act was contained in the 1934 enactment. In 1934, railroad employees were not fully organized, and there were a number of company unions. In those instances, there was no grievance procedure with a "usual manner" of permitting any union representation. Moreover, there were eighteen crafts represented by unions other than the BLE and the predecessors of UTU, and none of those eighteen crafts had any similarity to the situation discussed by UTU's Mr. Nelson about union representation. Since there was no uniform or customary treatment of union representation in grievance handling at that time, Congress could not have been referring to that subject. Rather the theory at that time related to individual treatment. Clearly, therefore, Congress had reference to the procedural steps followed on

the individual carrier properties at that time when it used "usual manner" in the statutory provision.

/s/ W. J. WANKE
W. J. WANKE

SWORN TO and subscribed before me this 23rd day of May 1984.

/s/ HAROLD A. ROSS
Notary Public

Exhibit "C"

UNITED TRANSPORTATION UNION

FRED A. HARDIN
International President
R. R. BRYANT, CLYDE F. LANE
Assistant Presidents
JOHN H. SHEPHERD
General Secretary and Treasurer

14000 Detroit Avenue
Cleveland, Ohio 44107
Phone: 216-776-9400

1202

January 19, 1981

Mr. W. H. Pelton, GC, UTU
Norfolk and Western Railway
817 Kilbourne Street
Bellevue, OH 44811

Dear Sir and Brother:

This will acknowledge and reply to your letter of January 8, 1981 advising that you are experiencing a problem at Conneaut, Ohio, in Local 421, with several individuals who participated in and successfully completed the enginemen's training program per Article VIII of the 1978 National Agreement. You advise that after entering engine service the employees chose to leave the United Transportation Union and join the BLE but that recently they had been furloughed from engine service and under the agreement had returned to brakeman status but continued to pay dues to the BLE. You further advise that you have discussed this matter with General Chairman Voyk who advised that his International had taken the position that, since the employes in question were actually employed in engine service and joined the BLE, they could continue to pay dues to the BLE even though they returned to the rank of Brakeman.

You requested that I advise whether or not the aforementioned employes must resume paying dues to the UTU or can they continue paying to the BLE even though working as brakemen, keeping in mind that you do have a Union Shop Agreement in effect on this property. I was aware that you had a Union Shop Agreement on your property. Union Shop Agreements are authorized by a specific provision of the Railway Labor Act. The provisions of the Railway Labor Act that authorize the making of Union Shop Agreements contain language which in effect says that, if an individual (in the operating crafts, that is, engineers, firemen, conductors, brakemen and yardmen) can comply with any Union Shop Agreement by belonging to any organization national in scope, having a representative on Division One. The BLE, of course, is national in scope and has a representative on Division One. If the individuals you mentioned are members of the BLE, then that would constitute compliance with our Union Shop Agreement. The same situation would be true if these individuals elected to retain their membership in UTU while working as engineers and declined to join the BLE. It is my understanding that in the past the BLE has not admitted to membership anyone who did not have "seniority rights" to engine service. That is, they normally did not admit to membership a brakeman or conductor unless he had some seniority rights in engine service. The individuals to whom you make reference obviously have seniority rights as brakemen and also as firemen and engineers. Therefore, the position taken by the BLE is consistent with positions taken in prior years in similar situations.

In the operating crafts an employee has a choice between two unions (provided that either the two unions

will admit him to membership) to belong to in order to comply with a Union Shop Agreement. When this Union Shop provision was enacted in the early 1950's there were only isolated instances where groundmen also held seniority in engine service, therefore, the application of the provision applied mainly to situations involving the Brotherhood of Railroad Trainmen, the Order of Railway Conductors and Brakemen and the Switchmen's Union of North America. It was not uncommon prior to the formation of the UTU for groundmen to belong to different organizations on the same property. It is only since we have made some agreements permitting groundmen to transfer to engine service that we have been confronted with this problem of the individual being furloughed from engine service and resuming service as a groundman. I believe that this will be a temporary situation, however, under the law an individual in the situation you describe can belong to either organization and comply with a Union Shop Agreement.

With kindest regards, I remain

Fraternally yours,

/s/ FRED A. HARDIN
President

cc: John Sytsma, Pres., BLE
J. L. Voyk, GC-BLE
J. P. Koontz, LC-421
W. O. Weber, Sec-421